Supreme Court, U.S.
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In The

Supreme Court of the United States

DISTRICT ATTORNEY HARRY F. CONNICK,
in his official capacity,

Petitioner,

v.

KEITH HUDSON,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether or not the Eleventh Amendment to the U.S. Constitution prohibits the filing in federal district court of a claim for money damages against a Louisiana district attorney in his official capacity.

PARTIES

The sole remaining parties to these proceedings are Petitioner District Attorney Harry F. Connick, in his official capacity, and Respondent Keith Hudson.

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PETITION FOR WRIT OF CERTIORARI

Harry F. Connick, District Attorney in and for the Parish of Orleans, State of Louisiana, in his official capacity, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit in this case.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 174 F.3d 677 (5th Cir. 1999).

JURISDICTION

The opinion of the United States Court of Appeals for the Fifth Circuit was rendered on May 13, 1999. The Court of Appeals denied a timely petition for rehearing on June 17, 1999. (App. 76-77). Pursuant to Supreme Court Rule 13.1, this petition has been timely filed within 90 days of the denial of rehearing.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Constitution, Eleventh Amendment
Louisiana Constitution, Art. 4 §8
Louisiana Constitution, Art. 5 §26
Louisiana Constitution, Art. 6 §5(G)
Louisiana Constitution, Art. 6 §7(B)

Louisiana Revised Statutes 16:71
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STATEMENT OF THE CASE

A. Course of Proceedings below.

Respondent Keith Hudson filed this *pro se* and *in forma pauperis* §1983 complaint arising out of his 1994 arrest and conviction for the offenses of battery against a police officer and felon in possession of a firearm. Jurisdiction of the U.S. District Court was based upon 28 U.S.C. §1331, federal quēstion jurisdiction. Originally made defendant were a variety of defendants, including two assistant district attorneys, in their individual capacities, and "the Orleans Parish District Attorney's Office". Following dismissal of all of his claims by the district court, Mr. Hudson filed an appeal with the U.S. Fifth Circuit Court of Appeals. By Order of the Court of Appeals, the dismissal of Harry Connick, in his official capacity as Orleans Parish District Attorney, was severed from the balance of the appeal. This severed portion of the appeal was remanded "for further development of both the evidentiary record and the law bearing on the entitlement to immunity of the Orleans Parish District Attorney's Office under the Eleventh Amendment of the United States Constitution . . . ".

In the Fifth Circuit, determination of a public entity's "entitlement to immunity" requires consideration of six factors as outlined in *Clark v. Tarrant County Texas*, 798 F.2d 736, 744-45 (5th Cir. 1986):

a) "whether the state statutes and case law view the agency as an arm of the state";

b) "the source of the entity's funding";

c) "the entity's degree of local autonomy";

d) "whether the entity is concerned primarily with local, as opposed to statewide concerns";

e) "whether the entity has the authority to sue and be sued in its own name";

and

f) "whether [the entity] has the right to hold and use property.

On remand and after considering the evidence introduced by the parties, U.S. Magistrate Judge Lance M. Africk issued his Report and Recommendation, recommending "that the Orleans Parish District Attorney's Office be dismissed because of its Eleventh Amendment immunity." With respect to the six factors outlined in *Clark v. Tarrant County, supra,* the Magistrate found: (1) that state statutes and caselaw pertaining to the relationship between the Orleans Parish District Attorney and the State of Louisiana are "a mixed bag", but "the Louisiana Supreme Court [has] held that the district attorney is 'a constitutional officer who serves in the judicial branch and exercises a portion of the sovereign power of the state within the district of his office'", citing *Diaz v. Allstate Insurance Company,* 433 So.2d 699, 701 (La. 1983), see Report and Recommendation, (App. at p. 47 and 54); (2) that "the sources of funding of the Orleans Parish District Attorney's office are diverse", *Id.* at p. 59; that the various funding is "commingled, with the exception of warrants paid directly by the State to the individual

district attorneys", *Id.* at p. 62, making it "unclear who bears legal liability in the event of a judgment against the Orleans Parish District Attorney's Office", *Id.* at p. 72; (3) that "circumscription [of the actions of the district attorney] may only be effected by the State", *Id.* at p. 73; (4) that the concerns of the district attorney are statewide as his "job is to prosecute activities made actionable by the State", *Id.*; (5) suits against the Office of the District Attorney necessarily raise claims against the District Attorney, in his official capacity, *Id.*; and (6) the "District Attorney's office holds and uses property titled both in the name of the City of New Orleans and the State of Louisiana", *Id.*

After review of the Magistrate's Report and Recommendation, U.S. District Court Judge Stanwood R. Duval approved the report and adopted it as his own opinion with additional comments. App. 33-41.

Following appeal of the district court's decision, a decision was rendered by the U.S. Fifth Circuit Court of Appeals, reversing the dismissal of all claims against Harry F. Connick, in his official capacity as Orleans Parish District Attorney, on the grounds of the Eleventh Amendment, concluding that "the Orleans Parish District Attorney's office is not an arm of the state." See Decision of the Panel, at App. 32. The Court of Appeals found that: (1) the factor regarding state statutes and caselaw defining the relationship between the various district attorneys and the State "points in different directions" and "decline[d] to count it either in support for, or denial of, Eleventh Amendment immunity", *Id.* at pp. 19-20; (2) state law does not require the State to indemnify a district attorney for any judgment arising out of a suit filed

under §1983, and that the bulk of the district attorney's discretionary funds are received from the City of New Orleans, *Id.* at pp. 24-27; (3) that although infrequently used, "viable" oversight of the actions of the district attorney is vested only with the Louisiana Attorney General, *Id.* at p. 28; (4) that the concerns of the district attorney are local, inasmuch as district attorneys are elected by voters in their district and their prosecutions take place within the boundaries of their district *Id.* at p. 30; (5) although the Office of the District Attorney is not an entity which can sue or be sued, "the distinction between the entity and an entity's officer sued in his official capacity is irrelevant for purposes of this Eleventh Amendment inquiry", *Id.*; and (6) given the conflict in the evidence, the factor relating to ownership of property "ha[d] little effect" upon the panel's decision, *Id.* at p. 31.

A timely application for rehearing was denied on June 17, 1999.

B. Underlying background of fact and Louisiana law.

In this §1983 suit, the crux of the complaint against District Attorney Connick is that two of his assistant district attorneys prosecuted and obtained convictions of plaintiff on charges of battery against a police officer and felon in possession of a firearm, while choosing not to prosecute plaintiff on other charges. The actions of which plaintiff complains are restricted to traditional prosecutorial functions taken by the district attorney on behalf of the State of Louisiana.

The Louisiana Constitution divides Louisiana state government into three branches, executive, legislative

and judicial. La. Const. Article 5, which deals with the judicial branch of state government, at Section 26 thereof, provides that there shall be a district attorney for each judicial district. For ease of administration, the boundaries of each judicial district in Louisiana is coterminous with the boundaries of a parish or group of parishes. Relying upon these constitutional provisions, the Louisiana Supreme Court has specifically held that a district attorney is "a constitutional officer who serves in the judicial branch and exercises a portion of the sovereign power of the state within the district of his office". *Diaz v. Allstate Insurance Company*, 433 So.2d 699, 701 (La. 1983).

The District Attorney in and for the Parish of Orleans, State of Louisiana, receives funds from various sources, but the bulk of these monies are either paid by the State of Louisiana or mandated by state statute. For example, the state pays the annual salaries of the district attorneys and their assistants (La. R.S. 16:10, 16:11 and 16:71); contributions by the City of New Orleans to defer the expenses of the district attorney's office are mandated by state statute (La. R.S. 16:71); the district attorney receives a portion of monies generated by the state criminal courts (See, for example, La. R.S. 16:16).

In the year 1995, the District Attorney received a total of nearly $6.6 million from all sources. Of that total, approximately $4.5 million (or 68%) came from various state sources. Approximately $1.7 million (or 26%) came to the District Attorney through appropriations made by the City of New Orleans pursuant to the mandate set forth at La. R.S. 16:71. The balance of approximately $400,000 (or 7%) came to the District Attorney's office through the vehicle of federal grants.

Local governing authorities have no control over the actions of the district attorneys. La. Const. Art. 6, Section 5(G) and 7(B). The district attorney hires, fire, promotes, and otherwise supervises assistant district attorneys and other personnel. La. R.S. 16:1(A), 16:17 and 16:71. Only the Attorney General has the authority to supervise and the power to supersede the actions of the district attorneys. La. Const. Article 4, Section 8 and La. Code of Criminal Procedure, arts. 61 and 62.

On the only occasion in the past when a judgment was rendered against District Attorney Harry F. Connick, in his official capacity, in *Mairena v. Foti*, 816 F.2d 1061 (5th Cir. 1987), the judgment was paid from the Louisiana State Treasury after special legislative action on the part of the Louisiana Legislature.

REASONS FOR GRANTING THE WRIT

I. The Fifth Circuit's opinion conflicts with relevant decisions of this Court, including particularly the decision rendered in *McMillian v. Monroe County, Ala.*

The exceptional importance of the decision of the U.S. Fifth Circuit, denying sovereign immunity to Louisiana District Attorneys, to defendant District Attorney Harry F. Connick, as well as to the various district attorneys of all the judicial districts of the State of Louisiana, as well as to the citizens and taxpayers of this State is obvious and cannot be gainsaid. The magnitude of the volume of litigation filed by state criminal defendants under §1983 has prompted federal litigation to ease the

burden not only upon defendants, but upon the federal courts themselves. 28 U.S.C. §1915. The increased burden of defense imposed upon Louisiana district attorneys by the Fifth Circuit's decision herein should not be underestimated. The wide-ranging effects and ramifications of this decision on pending and future litigation filed against District Attorney Harry Connick and other Louisiana district attorneys underscores the significance of the conflicts which exist between this decision and two recent decisions of this Court, *McMillian v. Monroe County, Ala.*, 520 U.S. 781, 117 S.Ct. 1734 (1997) and *Regents of the University of California v. Doe*, 519 U.S. 425, 117 S.Ct. 900, 137 L.Ed.2d 55 (1997).

In *McMillian, supra*, this Court analyzed Alabama law and held that Alabama sheriffs, acting as law enforcement officers, are state officials, and Monroe County could not be held legally responsible for those actions of the Monroe County Sheriff. The Court found that (1) jurisdiction limited to the borders of the county; (2) election by county voters; and (3) county payment of the sheriff's salary combined with mandated reimbursement by the county of expenses "reasonably necessary for the proper and efficient conduct of the affairs of the sheriff's office", (the very factors upon which the Fifth Circuit chiefly relied herein in refusing to afford the protection of Eleventh Amendment immunity to Louisiana district attorneys), were not " . . . sufficient to tip the balance . . . " in favor of finding the Alabama sheriffs to be county officials.

The Fifth Circuit decision herein dismissed *McMillian, supra*, as inapplicable to the issue of Eleventh Amendment immunity, inasmuch as it dealt with the

direct and legal liability of the county itself for the actions of the Alabama county sheriff, as opposed to the potential application of the Eleventh Amendment to bar actions brought against the Alabama sheriff in his official capacity. Appendix at App. 8, ftn. #1. The immateriality of this distinction becomes clear with reference to two different factors. First, in *McMillian*, while Monroe County was sued directly, the Monroe County Sheriff was also sued in both his individual and official capacities. *McMillian v. Johnson*, 88 F.3d 1573, 1576 (11th Cir. 1996) (noting at ftn. #2 that dismissal of the County as not legally liable for the actions of the Monroe County Sheriff would require a dismissal of claims brought against the Sheriff in his official capacity), affirmed *McMillian, supra*. Second, and even more significantly, this Court in *Regents of the University of California v. Doe*, 519 U.S. 425, 117 S.Ct. 900, 137 L.Ed.2d 55 (1997) has specifically said that with respect to the question of the Eleventh Amendment, it is the "entity's potential legal liability" which is the essential question.

It appears that other circuits will not follow suit and make the distinction drawn by the Fifth Circuit between the issues of determining ultimate legal liability for the actions of public officers and the application of the principles of the Eleventh Amendment to suits filed against these same public officers in their official capacities. In *Franklin v. Zaruba*, 150 F.3d 682 (7th Cir. 1998), the Seventh Circuit applied the *McMillian* analysis to the determination of whether or not the Eleventh Amendment barred suit in federal court against Illinois county sheriffs while performing their typical law enforcement duties. See also *Laidley v. McClain*, 914 F.2d 1386 (10th Cir. 1990)

[wherein the Court of Appeals first analyzed the issue of county liability for the actions of Oklahoma district attorneys and, after reaching a negative result, found that the Eleventh Amendment barred suit against the said Oklahoma district attorney without further analysis] and *Owens v. Fulton County*, 877 F.2d 947 (11th Cir. 1989) [wherein the Court, while concluding that Fulton County, Georgia was not liable for the actions of its District Attorney, felt compelled to distinguish the results reached regarding Eleventh Amendment immunity in *Crane v. Texas*, 766 F.2d 193 (5th Cir. 1985) and *Mairena v. Foti*, *supra*.]

District Attorney Harry F. Connick has been sued only in his official capacity. It is well-settled that such an official capacity suit is equivalent to a suit filed directly against the underlying entity. *Kentucky v. Graham*, 473 U.S. 159, 166 (1985). The question becomes what is the "underlying entity". There is no such entity as "the Office of the District Attorney". Under Louisiana law, "the Office of the District Attorney" may not sue or be sued. La. Const., Art. 5, Section 24. District Attorney Harry F. Connick does not have power to levy taxes; he has no power to borrow money to pay judgments rendered against him or to issue certificates of general indebtedness. There exist no "persuasive indicia of . . . independent status" sufficient to make the Office of the District Attorney solely responsible for judgments rendered against District Attorney Harry Connick in his official capacity. See *Moor v. County of Alameda*, 411 U.S. 693, 717-721, 93 S.Ct. 1785, 1799-1802, 36 L.Ed.2d 596 (1973). When District Attorney Harry Connick is sued in his official capacity, such a suit must be equivalent either

to a suit against the State of Louisiana, if Mr. Connick be a state official, or to a suit against the City of New Orleans, if Mr. Connick be a local official.

Under *McMillian*, it is clear that the City of New Orleans could not be held directly liable on the basis of allegations of actions taken by the District Attorney as state prosecutor. The City does not hire, fire, promote or supervise Harry Connick or his assistants. The New Orleans City Council may not require the District Attorney to prosecute municipal crimes or influence, direct or control his prosecutions in state criminal court. A suit against District Attorney Harry Connick, in his official capacity, is perforce a suit against the State of Louisiana and barred by the Eleventh Amendment.

II. The decisions of the various circuit courts of appeals are completely lacking in uniformity regarding the issue of Eleventh Amendment immunity and its availability to district attorneys.

Among the decisions of the various circuit courts of appeals which have directly addressed the issue of the application of the Eleventh Amendment to the district attorneys of the different states of the union, there is a marked lack of uniformity with respect both to the approach employed and to the result reached.

There appear to be two basic approaches to analysis of the Eleventh Amendment question which have been utilized by the circuits. Both the Second and the Sixth Circuits have utilized what can be characterized as a "functional" approach. *Gan v. City of New York*, 996 F.2d 522 (2nd Cir. 1993) and *Pusey v. City of Youngstown*, 11

F.3d 652 (6th Cir. 1993). The critical examination appears to be of the allegations of the complaint. What "function", duty, or purpose was served by the specific alleged conduct of the district attorney? Do the allegations of the complaint allege constitutional deprivations in the manner in which a district attorney conducted a state prosecution for violation of the state criminal law? Or, do the allegations of the complaint allege constitutional deprivations which occurred because of the manner in which the district attorney administered his office?

In the first instance, the Eleventh Amendment bars suit against the district attorney in his official capacity.

> "This ruling [that the District Attorney acted as a quasi-judicial officer of the state in criminal matters] was correct to the extent that the complaint attacked a decision as to whether or not to prosecute Thai . . . [T]o the extent that the complaint alleged that [DA] Morgenthau was implicated in [ADA] Rettler's decision not to bring charges against Thai, Morgenthau was properly deemed to be an official of New York State and was entitled to invoke Eleventh Amendment immunity."

Gan, supra, at p. 535-536. When this type of analysis is employed, the same result is reached even if all parties concede that the district attorney in question is an "employee" of the municipal or local government.

> "While we agree with the parties that [Prosecutor] Cronin is employed by the City of Youngstown, we nevertheless conclude that plaintiff's suit must fail as Cronin acted on behalf of the state when she was prosecuting state criminal charges . . . Clearly, state criminal laws and state

> victim impact laws represent the policy of the state. Thus, a city official pursues her duties as a state agent when enforcing state law or policy. [Citations omitted.] Because Cronin acts as a state agent when prosecuting state criminal charges, the suit against Cronin in her official capacity is to be treated as a suit against the state."

Pusey, supra, 11 F.3d at p. 657-658. If the complaint in these proceedings had been filed in either the Second or the Sixth Circuits, the result reached would have been different. Plaintiff Hudson's complaint against District Attorney Harry Connick in his official capacity would have been dismissed as barred by the Eleventh Amendment, based as it is upon allegations regarding the decisions made to prosecute certain charges while not prosecuting others.

The second basic approach to the application of the Eleventh Amendment to state prosecutors examines not the allegations of the complaint, but the nature of the office of district attorney itself. The decisions of the Third and Tenth Circuits, as well as the decision of the Fifth Circuit from which Petitioner seeks relief herein, are most fairly characterized as following this second approach. *Carter v. City of Philadelphia,* 181 F.3d 339 (3rd Cir. 1999), *Laidley v. McClain,* 914 F.2d 1386 (10th Cir. 1990), and *Rozek v. Topolnicki,* 865 F.2d 1154 (10th Cir. 1989).

Even within this basic approach, the various circuits differ in the analysis which is applied. In *Carter v. City of Philadelphia, supra,* the Third Circuit applied a three-factor analysis, as opposed to the six factors considered by the Fifth Circuit herein.

> "We determine Eleventh Amendment immunity by examining the evidence on three factors: (1) the source of funding – i.e., whether payment of any judgment would come from the state's treasury, (2) the status of the agency/individual under state law, and (3) the degree of autonomy from state regulation."

181 F.3d at p. 347. In applying this analysis, the Third Circuit relied upon findings to the effect that: (1) all of the funding of the D.A.'s office came from the City of Philadelphia (2) Pennsylvania's Constitution and laws defined the District Attorneys as county rather than state officers, and (3) the state exercised no control over the decisions of the district attorneys. As a result, the Third Circuit concluded that Pennsylvania district attorneys were not "arms of the State" and were therefore not entitled to the protection of the Eleventh Amendment.[1]

In *Laidley v. McClain, supra,* the Tenth Circuit first considered the issue of county liability for the acts of a Oklahoma district attorney. The court considered that: (1) a state agency pays the salaries and expenses of the district attorney's office; (2) employees of the district attorney serve at his pleasure; (3) although county voters elect the district attorney, this is the same manner in which district judges are elected in Oklahoma; and (4) although the "Oklahoma Supreme Court has not spoken definitively on the issue, there is some indication that it

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[1] The Third Circuit further stated that even if it chose to apply the "functional" test to the case before it, the allegations of the complaint alleged constitutional deprivations resulting from "administrative" and not "prosecutorial" conduct, and the result would be unchanged.

would view the district attorney as a state officer." 914 F.2d at pp. 1391-1392. After finding that the county could not be held liable under these circumstances, the court found that suit against the district attorney in his official capacity was barred by the Eleventh Amendment without further analysis. In arriving at the same conclusion with respect to Colorado district attorneys, in *Rozek v. Topolnicki, supra,* the Tenth Circuit mentioned only two considerations: (1) the district attorney was elected from a judicial district which encompassed four Colorado counties; and (2) the Colorado Supreme Court has held that Colorado district attorneys are executive officers of the state.

It appears likely that, if presented with the factual background of this case, either or both the Third Circuit and/or the Tenth Circuit would have arrived at a different result than did the Fifth Circuit. While the Third Circuit also considered the "source of funding" of primary importance, the Third Circuit has not drawn any distinction between "discretionary" and "dedicated" funding. Such a distinction is, in truth, arbitrary. The funds received by the Orleans Parish District Attorney, from whatever source, are commingled by deposit into the general operating fund. If the District Attorney chose to pay a judgment rendered against him in his official capacity from this fund, it would be impossible to determine the source of the funds. In this case, where stipulations between the parties show that over 65% of the funding of the "Orleans Parish District Attorney's Office" comes from the Louisiana state treasury, it would appear to be at least arguable that the Third Circuit would

resolve this issue in favor of extending Eleventh Amendment immunity to Louisiana district attorneys.

The sole distinction between the facts presented to the Tenth Circuit in *Laidley v. McClain, surpa,* and the facts of this case is the mixed nature of the funding received by Mr. Connick's office. It is unlikely that this distinction alone would cause the Tenth Circuit to arrive at a conclusion contrary to that it reached in *Laidley, surpa,* particularly in light of this Court's decision in *McMillian, supra,* discussed hereinabove.

While the boundaries of the judicial district served by Mr. Connick are coterminous with the boundaries of the Parish of Orleans, there are other judicial districts in Louisiana which encompass more than one parish. There would appear to be no basis for the Tenth Circuit to view the application of the Eleventh Amendment to Louisiana district attorneys as any different from its application to district attorneys in Colorado which was decided by that Court in *Rozek, supra.*

CONCLUSION

There is a total lack of uniformity among the circuit courts of appeals with respect to the application of the Eleventh Amendment to suits filed against district attorneys in their official capacities. Given the obvious importance of the issue and the frequency with which it is encountered, it is imperative that this Court act to clarify the relationship between the issues of legal liability of governmental entities for the acts of public officials and whether or not the Eleventh Amendment bars suit

against the same public officers in their official capacities, as well as to outline the proper approach to be employed when determining application of the Eleventh Amendment to §1983 official-capacity claims.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-30964

KEITH HUDSON,

Plaintiff-Appellant,

UNIDENTIFIED PARTIES,

Defendants-Appellees,

versus

CITY OF NEW ORLEANS; DISTRICT ATTORNEY'S OFFICE; SUSAN RICHARDSON; MAURICE LANDRIEU,

Defendants-Appellees.

Appeals from the United States District Court
for the Eastern District of Louisiana

(Filed May 13, 1999)

Before REYNALDO G. GARZA, STEWART, and PARKER, Circuit Judges.

CARL E. STEWART, Circuit Judge:

The question before us is whether the Orleans Parish District Attorney's Office is an arm of the state of Louisiana and therefore immune from suit in federal court under the Eleventh Amendment. We find that it is not, and REVERSE the decision of the district court.

Factual & Procedural Background

In 1994, Plaintiff-appellant Keith Hudson was convicted in Louisiana state court for battery and illegal possession of a firearm. After conviction and while an inmate, Hudson filed a federal lawsuit under 42 U.S.C. § 1983 alleging several civil rights violations based on the circumstances surrounding his February 22, 1994 arrest and subsequent detention. One of the defendants named was the Orleans Parish District Attorney's Office.

In July 1995, the magistrate judge recommended that Hudson's claim against the Orleans Parish District Attorney's Office be dismissed on grounds of Eleventh Amendment immunity. The magistrate judge reasoned that the Orleans Parish District Attorney's office was an office within the state government, and so was entitled to this immunity. The district court agreed, and entered a judgment in favor of the defendants in August 1995.

Hudson appealed this decision, along with several other decisions the district court had made with respect to other defendants in the lawsuit, to this Court. We severed the issue of Eleventh Amendment immunity from the other questions presented for review, and then remanded this issue for further development of both the evidentiary record and the law bearing on the entitlement to immunity. In particular, we noted that the question presented would be governed by the six-factor test we established in *Clark v. Tarrant County*, 798 F.2d 736, 744-45 (5th Cir. 1986), and that in its *Clark* analysis the district court should defer to Louisiana's interpretation of its statutes and case law. Those factors are:

1. Whether the state statutes and case law view the agency as an arm of the state;

2. The source of the entity's funding;

3. The entity's degree of local autonomy;

4. Whether the entity is concerned primarily with local as opposed to statewide, problems;

5. Whether the entity has the authority to sue and be sued in its own name; and

6. Whether the entity has the right to hold and use property.

Id.

After holding an evidentiary hearing, the magistrate judge issued a recommendation urging the district court again to dismiss Hudson's case on Eleventh Amendment grounds. As we had required, the magistrate analyzed Defendant-appellee Orleans Parish District Attorney's office's entitlement to immunity under the *Clark* factors. He concluded that: (1) in accordance with the Louisiana Supreme Court's opinion in *Diaz v. Allstate Ins. Co.*, 433 So.2d 699 (La. 1983), the Orleans Parish District Attorney's office is under state control; (2) it is unclear who would be liable to pay a judgment against the office; (3) the office does not enjoy local autonomy; (4) the Orleans Parish District Attorney's office is primarily concerned with state rather than local concerns; (5) a suit against the office necessarily raises claims against the District Attorney in his official capacity; (6) and that the office holds and uses property titled both in the name of the City of New Orleans and in the name of the State of Louisiana.

The district court subsequently adopted the magistrate's opinion with additional comments, and dismissed Hudson's claim. Most importantly, the district court rejected part of the magistrate's analysis under the first prong of the Clark test, and noted that the Louisiana's Supreme Court's opinion in Diaz had been legislatively overruled. The district court nevertheless ruled that Diaz did not alter the outcome of the case, and again ordered Hudson's claim against the Orleans Parish District Attorney's office be dismissed.

Discussion

I

Before directly addressing the Eleventh Amendment issue, we pause for a moment to consider how this suit was pled in federal district court. Among other defendants, Hudson brought this § 1983 suit against the Orleans Parish District Attorney's office. However, Louisiana law does not permit a district attorney's office to be sued in its own name. *See* La. Const. art. V, § 24. Rather, it requires that the claim be brought against the district attorney in his official capacity. *See Riley v. Evangeline Parish Sheriff's Office*, 637 So.2d 395 (La. 1994) (treating a claim against a Sheriff's Office as actually one against the Sheriff in his official capacity). Because we generally follow state law on this issue, *see* Fed. R. Civ. P. 17(b); *Gegenheimer v. Galan*, 920 F.2d 307, 310 (5th Cir. 1991), the district court treated the claim as one against District Attorney Harry F. Connick, in his official capacity as District Attorney for the Parish of New Orleans. Both parties argue that this treatment was correct.

We agree, although we point out that for purposes of the Eleventh Amendment we do not generally distinguish between suits brought against an entity and suits brought against the entity's officers in their official capacity. *See Hafer v. Melo*, 502 U.S. 21, 25 (1991); *Kentucky v. Graham*, 473 U.S. 159, 166 (1985) ("[A]s long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity."). The sole exception to this rule is when the plaintiff seeks prospective relief. *See Darlak v. Bobear*, 814 F.2d 1055, 1060-61 (5th Cir. 1987) (observing that the *Ex Parte Young*, 209 U.S. 123 (1908) exception to the Eleventh Amendment applies when a suit is brought against a state official, as opposed to a state entity, challenging the constitutionality of his action, and the relief involved is prospective); *Voisin's Oyster House, Inc. v. Guidry*, 799 F.2d 183, 188 (5th Cir. 1986). The plaintiff in this case does not meet this exception as he is seeking retroactive monetary relief. *See Darlak*, 814 F.2d at 1062 n.7.

Thus, while the nominal defendant is the Orleans Parish District Attorney's office, for all purposes except our Eleventh Amendment analysis the court will consider the defendant as being District Attorney Harry Connick in his official capacity.

II

Hudson argued to the district court, and again urges on appeal, that we have already decided in *Mairena v. Foti*, 816 F.2d 1061, 1064 n.1 (5th Cir. 1987) that the Orleans Parish District Attorney's office is not protected

by the Eleventh Amendment. *Mairena* involved a § 1983 lawsuit brought against the Orleans Parish District Attorney in his official capacity. In a footnote we explained that we did not see any basis to distinguish *Crane v. Texas*, 766 F.2d 193 (5th Cir. 1985) (holding that Texas district attorneys were not protected by the Eleventh Amendment). *See Mairena*, 816 F.2d at 1064 n.1. Consequently, we held that district attorneys in Louisiana are not arms of the state and not entitled to sovereign immunity under the Eleventh Amendment.

Hudson claims that our *Mairena* decision is binding precedent, and can only be overruled by an *en banc* court. Because we hold that the *Mairena* decision was correct, we need not address Hudson's contention. Several district courts, including the one below, have argued that Mairena's precedential value is questionable, however, because there we had not applied the six-factor Clark test. Additionally, we have held that "analogies between like entities cannot replace consideration of the six relevant factors." *Flores v. Cameron County, Texas*, 92 F.3d 258, 268 (5th Cir. 1996); *see also McDonald v. Board of Mississippi Levee Commissioners*, 832 F.2d 901, 908 (5th Cir. 1987). We therefore take this opportunity to clarify why the Eleventh Amendment does not immunize the Orleans Parish District Attorney's office.

III

Generally speaking, the Eleventh Amendment to the United States Constitution prevents states from being sued in federal court. Underneath this perhaps simple

statement, however, lies great ambiguity. *See* John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 47 (1998) ("As everyone knows, the Eleventh Amendment is a mess") (omitting footnote). At the heart of this case is the issue of what is included in the term "state." The view that the amendment only prevents the state from being a named defendant to a federal action was rejected long ago. Instead, a "suit may nonetheless be barred by the Eleventh Amendment if the state is the real, substantial party in interest because the suit seeks to impose a liability which must be paid from public funds in the state treasury." *See, e.g., Pendergrass v. The Greater New Orleans Expressway Commission*, 144 F.3d 342, 344 (5th Cir. 1998) (citing *Edelman v. Jordan*, 415 U.S. 651, 663 (1974)).

Of course, identifying when the state is a real, substantial party in interest is often not an easy task. Courts are frequently put in the position of deciding whether the defendant being sued is better described as an arm of the state partaking in the privileges of Eleventh Amendment immunity or whether the defendant is actually part of a political subdivision unprotected by the Eleventh Amendment. To help identify when a suit against a governmental entity, or an official of the entity sued in his official capacity, is considered to be a suit against the state, we have in the past utilized six factors:

1. Whether the state statutes and case law view the agency as an arm of the state;

2. The source of the entity's funding;

3. The entity's degree of local autonomy;

4. Whether the entity is concerned primarily with local as opposed to statewide problems;

5. Whether the entity has the authority to sue and be sued in its own name; and

6. Whether the entity has the right to hold and use property.

Clark, 798 F.2d at 744.[1] A defendant need not possess each of the above attributes to benefit from the Eleventh Amendment. Nor are these factors necessarily equal to

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[1] The Orleans Parish District Attorney's office cites *McMillian v. Monroe County*, 520 U.S. 781, 117 S.Ct. 1734 (1997), in support of a different approach to the arm of the state analysis. In *McMillian*, the Court held that the Monroe County Sheriff was a state policymaker, as opposed to a county policymaker, for purposes of county liability under 42 U.S.C. § 1983. In drawing this conclusion, the Court observed that it did not look to whether the sheriff acted for the state in an "all or nothing manner" but rather whether he did so while acting in a law enforcement capacity. *See id.* at ___, 117 S.Ct. at 1737. From *McMillian*, the Orleans Parish District Attorney's office fashions a test in which we would look at the function of the officer being sued. Applying this test here, the Orleans Parish District Attorney's office would have us conclude it is a state office because Hudson's lawsuit focuses around an action the office took in a criminal prosecution on behalf of the State of Louisiana.

McMillian did not concern the Eleventh Amendment. Instead, it dealt with the issue of county liability in § 1983 lawsuits. While we look at the function of the officer being sued in the latter context, we do not in our Eleventh Amendment analysis. *See Esteves v. Brock*, 106 F.3d 674, 677-78 (5th Cir. 1997) (dealing with county liability in the § 1983 context) (distinguishing the result reached in the Eleventh Amendment case of *Crane v. Texas*, 766 F.2d 193 (5th Cir. 1985)).

one another. Indeed, it is well established that the second is the most important. *See Delahoussaye v. City of New Iberia*, 937 F.2d 144 147-48 (5th Cir. 1991) ("Because an important goal of the Eleventh Amendment is the protection of state treasuries, [this is] the most significant factor in assessing an entity's status."); *see also Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 48-49 (1994) (citing *Jacintoport Corp. v. Greater Baton Rouge Port Comm'n*, 762 F.2d 435, 440 (5th Cir. 1985)); *Pendergrass*, 144 F.3d at 345. In contrast, we typically deal with the last two factors in a fairly brief fashion. *See, e.g., Pendergrass*, 144 F.3d at 347; *Delahoussaye*, 937 F.2d at 147. Rather than forming a precise test, these factors help us balance the equities and determine as a general matter "whether the suit is in reality a suit against the state itself." *Laje v. R.E. Thomason General Hosp.*, 665 F.2d 724, 727 (5th Cir. 1982).

In the instant case, we must resolve whether the Orleans Parish District Attorney's office is an arm of the state of Louisiana for purposes of the Eleventh Amendment. Before turning to the specific facts involved here and reviewing them through the filter of the Clark test, however, it is useful to note that we addressed this same question, and in fact ultimately reached opposite conclusions, with respect to district attorneys in both Texas and Mississippi.

In *Crane v. Texas*, 766 F.2d 193 (5th Cir. 1985), we held that Texas district attorneys were not protected by the Eleventh Amendment. We conceded that Texas district attorneys were created by the state constitution and therefore were in some senses officers of the state. *See id.* at 194. In the end, however, we concluded that the balance had to be struck against Eleventh Amendment

immunity. We pointed out that the office was funded by the county, not the state, and that a judgment against the district attorney in his official capacity would expend itself on the county's treasury. *See id.* We also observed that the powers of a district attorney were limited to a county, that the state could not oversee prosecutorial decisions, and that district attorneys were elected by voters of the county. *See id.*

In contrast, in *Chrissy F. by Medley v. Mississippi Dept. of Public Welfare*, 925 F.2d 844, 849 (5th Cir. 1991), we held that protections of the Eleventh Amendment encompassed Mississippi district attorneys. While this result differed from that reached in *Crane*, the reasoning in both cases focused around the same issues. Most importantly, we found that Mississippi district attorney offices were primarily state-funded. *See id.* We also noted that the Mississippi district attorney could represent the state in judicial proceedings outside the district in which he or she served. *See id.*

Having examined the most relevant precedent, we can now turn directly to the facts specific to the Orleans Parish District Attorney's office. We review *de novo* the district court's decision to dismiss on Eleventh Amendment grounds. *See Kenedy Memorial Foundation v. Mauro*, 21 F.3d 667, 670 (5th Cir. 1994) (reviewing the dismissal for lack of subject-matter jurisdiction *de novo*); *Warnock v. Pecos County*, 88 F.3d 341, 343 (5th Cir. 1996) (noting the Eleventh Amendment deprives a federal court of subject-matter jurisdiction). After a very careful review, we conclude that the Orleans Parish District Attorney's office is not an arm of the state and therefore not entitled to the benefits of the Eleventh Amendment. The question is a

close one; as we will elaborate upon below, the state's constitutional framework classifies district attorneys as state officials, and there exists a potential constitutional mechanism for the Louisiana Attorney General to oversee at least some of the district attorneys' prosecutorial decisions. Nevertheless, we perceive the balance as tilting against sovereign immunity. The two most important considerations pointing towards sovereign immunity are both significantly undermined by Louisiana's political realities. Despite the state constitution, the Louisiana legislature has treated district attorneys more like representatives of the state's political subdivisions than of the state itself. And although the Attorney General theoretically could oversee local prosecutions, that power is greatly hampered by the requirements that such intervention occur only with cause and with judicial authorization. Ultimately we are most persuaded by the fact that the state treasury will in all likelihood be left untouched if damages were to be levied against the Orleans Parish District Attorney's office. It is well established that this second factor is crucial to our Eleventh Amendment arm of the state analysis. *See Delahoussaye v. City of New Iberia*, 937 F.2d 144, 147-48 (5th Cir. 1991). In sum, we conclude that the Orleans Parish District Attorney's office is not protected from suit in federal court by the Eleventh Amendment.

A

The first factor we take into account is how the state, through its constitution, laws, judicial opinions, attorney general's opinions, and other official statements, perceives the entity in question. *See Pendergrass v. The Greater*

New Orleans Expressway Commission, 144 F.3d 342, 344-45 (5th Cir. 1998). If the state characterizes the office in question as an arm of the state, this factor is counted in favor of Eleventh Amendment immunity. *See id.* The district court described this factor as "a mixed bag." We agree, and consider this factor as neither cutting towards or against Eleventh Amendment immunity.

1

On the one hand, the Louisiana constitution considers the Orleans Parish District Attorney's office an arm of the state. The Louisiana constitution divides its attention between the state government, which is further subdivided into the legislative, executive, and judicial branches, and the local government. *Compare* LA. CONST. art. II, § 1 (dividing the state government into three branches) *with id.* at art. VI (dealing with local government). Importantly, the provisions establishing the offices of district attorney are contained within the articles that deal with state government – specifically in article V, which deals with the Judicial Branch. *See id.* at art. V, § 26. The relevant provision creates the office of district attorney for each judicial district, specifies that they are elected officials, limits their term of office to six years, establishes qualifications for the office, and permits them the power to appoint assistant district attorneys. *See id.* at. art. V, § 26(a). It also specifies that the district attorney, or a designated assistant, "shall have charge of every criminal prosecution by the state before the grand jury in his district, be the representative of the state before the grand jury in his district, and be the legal advisor to the grand jury." *See id.* at art V, § 26(b). Given its method of

organization, we suspect that the framers of the state constitution assumed that district attorneys were officers of the state.[2]

This suspicion is confirmed by the Louisiana Supreme Court, which has mentioned on several occasions that the district attorney is a state officer who exercises constitutional duties. First, the Louisiana Supreme Court appears to view district attorneys as state officials as opposed to parish officials. *See Diaz v. Allstate Ins. Co.*, 433 So.2d 699, 701 (La. 1983). Interpreting article V, § 26 of the state constitution, the *Diaz* court held:

> A district attorney is a constitutional officer who serves in the judicial branch and exercises a portion of the sovereign power of the state within the district of his office. His office, duties and powers are governed by the constitution and the legislature, and are not subject to local control. His office, therefore, is an office of state, not local government.

Id. at 701 (citations omitted).[3] While only two justices agreed with this part of the opinion at the time *Diaz* was handed down, subsequent decisions by that court reiterate this conclusion without reservation. *See Knapper v.*

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[2] Hudson contends that our analysis overlooks the fact that the Louisiana constitution in two places refers to district attorney as "parish" officials. *See* LA. CONST. art. VI, §§ 5(g) & 7(b). This exact argument has already been rejected by the Louisiana Supreme Court. *See Diaz*, 433 So.2d at 701 n.3.

[3] This portion of *Diaz* is still good law. The part of the *Diaz* opinion interpreting LA. REV. STAT. ANN. § 13:5108.2, however, has been legislatively overruled. *See* La. Atty. Gen. Op. No. 89-210A (Sept. 8, 1989).

Connick, 681 So.2d 944, 945 (La. 1996) (citing this portion of *Diaz*); *Board of Commissioners of the Orleans Levee District v. Connick*, 654 So.2d 1073, 1077 (La. 1995) (same). Additionally, in *State v. Saizan*, 692 So.2d 1045, 1050 (La. 1997), the Louisiana Supreme Court distinguished between municipal prosecutors and district attorneys, noting that the former enforce local ordinances and represent specific localities, while the latter enforce state law and represent the state. *See id.* The state's view, at least when the state constitution is involved, appears to be that the Orleans Parish District Attorney's office is an extension of the state.[4]

The parties strongly disagree as to how significant a role this conclusion should play in our analysis under this factor: Hudson suggests it should barely matter, if at all, while the Orleans Parish District Attorney's office considers it decisive. We reject both extremes, and simply consider it one glimpse into how the state of Louisiana characterizes its district attorneys.

Hudson contends that our precedent requires us to put little stock in the fact that the state constitution creates the district attorney. We disagree. Although we held in *Crane v. Texas*, 788 F.2d 193 (5th Cir. 1985) (per curiam) that a Texas district attorney sued in his official capacity could not share in the state's Eleventh Amendment immunity despite the fact that the Texas constitution created the district attorney's office, our analysis did

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[4] In drawing this conclusion, we do not rely on abstract references to Louisiana district attorneys as state officers. *See, e.g., Knapper*, 681 So.2d at 947. We have declined to consider similar references in the past. *See Crane*, 766 F.2d at 194 n.1.

not ignore the state constitution. *See id.* at 194. Rather, we closely read the document and concluded that the significance derived from its creation of the office was diminished because "other local officers are created by it as well." *Id.* This distinction does not apply to the case at bar. Unlike the Texas constitution, which intermingles its discussions of state and local governmental entities, the Louisiana Constitution carefully divides its attention between the two and primarily discusses the district attorneys' office in the portions reserved for state government. Therefore, we can give the fact that the state constitution views the district attorney's office as a state office the full weight it deserves.

That is not to say that our analysis considers this fact decisive with respect to the first factor. The Orleans Parish District Attorney's office suggests that this fact should end our inquiry because our analysis of this factor is governed by a test fashioned by the Louisiana Supreme Court to resolve whether an entity is a state office or a local office. *See Mullins v. State*, 387 So.2d 1151, 1152 (La. 1980). Under that test, " '[i]f the office is created by the legislature, or is established in the first instance by the constitution, it is a state office.' " *See id.* at 1152 (quoting *State v. Taylor*, 11 So. 132 (La. 1892)).

We cannot adopt this approach, however. While we refer to the provisions of state law to assess an entity's entitlement to Eleventh Amendment immunity, *see Regents of the University of California v. Doe*, 519 U.S. 425, ___n.5, 117 S.Ct. 900, 904 n.5 (1997), federal law ultimately controls the scope of our Eleventh Amendment analysis. *See id.; see also Earles v. State Board of Certified Public Accountants*, 139 F.3d 1033, 1036 (5th Cir. 1998).

That is, federal law has designed our Eleventh Amendment analysis, and it alone sets the bounds of what we look to in conducting our inquiry. Although federal precedent requires that we look to the state's view of the entity in question to help us reach our conclusion, and that we do so by looking at state law, this state law is relevant only to the extent that it gives us insight into how the state perceives the entity. It certainly does not limit the scope of our inquiry, as the Orleans Parish District Attorney's office suggests.

Applying this understanding, we do not look to, for instance, the Louisiana constitution because the Louisiana Supreme Court instructed us to do so, but rather because our precedent requires that we do so. *See Crane*, 766 F.2d at 194 (examining the Texas constitution). It is entirely a matter of coincidence that the Mullins test would have us look at the same document. More visibly, the fact that we find that the Louisiana constitution creates the office of district attorney in its articles dealing with state government does not end our inquiry, as it might under *Mullins*. Rather, we continue with our analysis of the first factor, examining other provisions of state law to find the Orleans Parish District Attorney's office's "place in the overall scheme of Louisiana government." *Earles*, 139 F.3d at 1037.

2

Although the state constitution characterizes the Orleans Parish District Attorney's office as an arm of the state, the state legislature seems to take the opposite

view. First, the legislature has not hesitated in assigning local functions to district attorneys. *See* LA. CONST. art V, § 26(b) (noting that district attorneys "shall perform other duties provided by law"). For example, district attorneys, in the name of a parish, have the right to file suits to abate public nuisances. *See* LA. REV. STAT. ANN. § 13:4722. Also, in all suits against political subdivisions of the state, service is proper on the district attorney for the district in which the political subdivision is found if no agent has been designated for service of process. *See* LA. REV. STAT. ANN. § 13:5107(b). Similarly, Louisiana district attorneys can advise the governing authority of the parish on compromising or settling any claim against the parish. *See* LA. REV. STAT. ANN. § 13:5109. Moreover, district attorneys can act as counsel for parish boards and commissions, and even city school boards, within their districts. *See* LA. REV. STAT. ANN. § 16:2(A). In these ways, the Louisiana legislature has treated district attorneys more like local officials than officers of the state.

Additionally, the state legislature has put considerable distance between itself and district attorneys. This is illustrated by LA. REV. STAT. ANN. § 42:1441(a), which declares that the state cannot be named as a party when the basis of the lawsuit are the acts or omissions by a district attorney or an employee of a district attorney.[5] *See*

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[5] Section 42:1441 only forbids the state from being named as an actual party to a lawsuit. Reading this provision in isolation, the state could still be required to indemnify the district attorney in the event of an unfavorable judgment. This conclusion is illustrated by § 42:1441(b), which provides that "the provisions of said Subsection A [should not] be construed to amend or repeal R.S. 13:5108.1." As we conclude later in this

Gibson v. State of Louisiana, 644 So.2d 1148 (La. App. 4th Cir. 1994) (relying on § 42:1441(a) when holding that "[t]he District Attorney's Office is not the State and the State is not liable for the acts of the District Attorney or his employees."); *Obermier v. State of Louisiana*, 606 So.2d 937, 939 (La. App. 3rd Cir. 1992) (relying on § 42:1441(a) when holding that "[i]f a party is seeking recovery for damages against a district attorney of the state of Louisiana, the path of recourse does not lead to the state. The statute mandates that the state shall not be liable for any damages caused by the district attorney."). Further, the legislature recently forbade courts from holding the state vicariously liable for the "offenses and quasi offenses" of the district attorney. *See* LA. REV. STAT. ANN. §§ 42:1441.1 & 42:1441.2.

Finally, recent opinions of the Attorney General suggest that the Orleans Parish District Attorney's office is

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opinion, however, the legislature eliminated its obligation to indemnify the district attorney under § 13.5108.1.

The Orleans Parish District Attorney's office argues we should ignore § 42:1441 because it is constitutionally infirm. Only a single state district court has found this to be true, however, and that decision was set aside by the Louisiana Supreme Court. *See Diaz*, 433 So.2d at 701 (setting aside lower court determination that § 42:1441 violated LA. CONST. art. XII, § 10(a)). Moreover, the Orleans Parish District Attorney's office concedes that § 42:1441 may be constitutional following the 1995 amendment to LA. CONST. art. XXII, § 10. Our own review of the constitutional provisions in question, unaided by actual arguments by the parties, suggests that the Orleans Parish District Attorney's office's concession is probably a wise one. In any event, we utilize § 42:1441 not for its legal force but to highlight the state legislature's view of the district attorney's office.

more properly considered a local rather than a state entity. In La. Atty. Gen. Op. No. 89-210A (Sept. 8, 1989), the Attorney General noted that the legal position of district attorneys and similar officials has become "perhaps the most unsettled area of local government law." His evaluation rested on dramatic changes in the state legislature's view of these officials, specifically referring to the 1985 passage of LA. REV. STAT. ANN. §§ 42:1441.1-.4, which legislatively overruled several Louisiana Supreme Court decisions including *Mullins*, and the 1984 amendments to LA. REV. STAT. ANN. § 13:5108.2, which overruled the Louisiana Supreme Court's decision in *Diaz*. Most importantly, he observed that these changes indicated a legislative intent to shift responsibility over the district attorneys from the state to the local level. Thus, while the Attorney General had opined in 1987 that for most circumstances the district attorney is not a political subdivision, *see* La. Atty. Gen. Op. No. 87-328 (July 1, 1987), by 1990 he had concluded that district attorneys and their employees are considered employees of their respective parishes despite the fact that they exercise constitutional and statutory authority. *See* La. Atty. Gen. Op. No. 90-194 (May 25, 1990).

In sum, the state's view of the district attorneys is complex and perhaps even still changing. On the one hand, the state appears to place them as officers of the state in its constitutional scheme. On the other, the state indicates through its legislation and opinions of the attorney general that they are part of local government. We agree with the district court's assessment that this factor points in different directions, and as such, we decline to count it either in support for, or denial of, Eleventh

Amendment immunity. *See Earles v. State Board of Certified Public Accountants*, 139 F.3d 1033, 1038-39 (5th Cir. 1998) (considering a conflicting factor not to impact the Eleventh Amendment conclusion).

B

The second factor we look to is the source of funding for the Orleans Parish District Attorney's Office. *See Clark*, 798 F.2d at 744. We conduct this examination to determine whether a judgment against it will be paid with state funds. *See, e.g.,Pendergrass*, 144 F.3d at 345-46 (examining the source of funding to determine if the judgment would be paid out of the state treasury); *Earles*, 139 F.3d at 1037 (same). It bears repeating that this is the most important factor in our Eleventh Amendment arm of the state analysis. *See Delahoussaye*, 937 F.2d at 147-48. In assessing this second factor, we conduct inquiries into, first and most importantly, the state's liability in the event there is a judgment against the defendant, and second, the state's liability for the defendant's general debts and obligations. *See Jacintoport Corp.*, 762 F.2d at 441.

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The Orleans Parish District Attorney's Office submits that the state is required under LA. REV. STAT. ANN. § 13:5108.1 to indemnify it in the event of an unfavorable

§ 1983 judgment.[6] We have before considered an indemnification statute, obliging the state to pay for judgments rendered against the defendant in his official capacity, sufficient to fulfill this factor.[7] *See Voisin's Oyster House,*

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[6] That section provides in pertinent part:

> A. It is hereby declared to be the public policy of this state that the state shall hold harmless and indemnify *all officers and employees of the state* from any financial loss which, for purposes of this Section, shall mean and include . . . judgment in federal court brought pursuant to the provisions of Sections 1981 through 1983 of Title 42 of the United States Code by reason of alleged negligence or other act by an officer or employee, provided that such officer or employee at the time damages were sustained was acting in the discharge of his duties and within the scope of his employment and that such damages did not result from the intentional wrongful act or gross negligence of such officer or employee.

See LA. REV. STAT. ANN. § 13:5108.1 (emphasis added). That is, § 13:5108.1 deals with indemnification in the event of a federal civil rights lawsuit. This is in contrast to § 13:5108.2, which deals with indemnification in the event of a state negligence lawsuit.

[7] With respect to indemnification statutes, it is important to remember that this lawsuit was not brought against District Attorney Harry Connick in his personal (sometimes referred to as individual) capacity. The Eleventh Amendment does not come into play in personal capacity suits, *see Flowers v. Phelps*, 964 F.2d 400, 401 n.2 (5th Cir. 1992) (per curiam), and the existence of an indemnification statute promising to pay judgments when an officer is sued in his individual capacity does not extend the Eleventh Amendment's protections around the officer. *See Flowers*, 964 F.2d at 401 n.2 (citing *Downing v. Williams*, 624 F.2d 612, 626 (5th Cir. 1980) ("Such an indemnity statute is only an agreement between the state and these individuals and cannot thereby be converted into an extension

Inc. v. Guidry, 799 F.2d 183, 188 (5th Cir. 1986). In fact, *Voisin's* dealt with the very statute the Orleans Parish District Attorney's office cites today. There, we confronted a § 1983 suit brought against the Secretary of the Louisiana Department of Wildlife and Fisheries in his official capacity. In assessing the Secretary's immunity under the Eleventh Amendment, we relied upon both §§ 13:5108.1 and 13:5108.2 in concluding that, because the state would be obliged under Louisiana law to indemnify the Secretary, the lawsuit was really one against the state. *See id.* at 188; *see also Hughes v. Savell*, 902 F.2d 376, 379 n.5 (5th Cir. 1990).

However, § 13:5108.1 does not apply to district attorneys. The section explains that its protections extends to "officers and employees of the state," *see* LA. REV. STAT. ANN. § 13:5108.1, but relies on § 13:5108.2 to clarify whom this phrase includes. *See* La. Atty. Gen. Op. No. 80-105A (Jan. 8, 1981); *see also Voisin's*, 799 F.2d at 188 (citing both §§ 13:5108.1 and 13:5108.2, even though the case dealt with a § 1983 suit, and § 13:5108.2 primarily deals with indemnification in negligence suits). In 1984, the state legislature amended § 13:5108.2 to exclude district attorneys from state indemnification.[8] *See* LA. REV. STAT. ANN. § 13:5108.2 (explaining that the phrase "an official, officer, or employee of the state" no longer includes "parish

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of Eleventh Amendment immunity by the state."), *vacated on other grounds*, 645 F.2d 1226 (5th Cir. 1981)).

[8] The apparent cause of this statutory amendment was a Louisiana Supreme Court decision interpreting § 13:5108.2 to include district attorneys. *See Diaz v. Allstate Insurance Company*, 433 So.2d 699 (La. 1983).

officials set forth and named in Article VI, Sections 5(G) and 7(B) of the Constitution of Louisiana."); LA. CONST. art. VI, §§ 5(g) & 7(b) (mentioning district attorneys in both); *see also* La. Atty. Gen. Op. No. 89-210A (Sept. 8, 1989) (recognizing this turn of events).

We thus conclude that § 13:5108.1 is properly read to exclude district attorneys from indemnification in the event of a § 1983 suit.[9] Because we conclude that the state will not be required under § 13.5108.1 to indemnify the Orleans Parish District Attorney's office, we need not consider Hudson's alternative argument that the Supreme Court's decision in *Regents of the University of California v. Doe*, 519 U.S. 425 (1997) overrules our holding in *Voisin's* that a state's indemnification statute is sufficient to count this factor in favor of Eleventh Amendment

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[9] In addition, it is possible that § 13:5108.1 has no application here even if it included district attorneys. First, that section requires that the Attorney General be contacted five days after the lawsuit is filed. *See* LA. REV. STAT. ANN. § 13:5108.1(b). According to testimony from Camille Grace Buras, first assistant to District Attorney Harry Connick, that has not occurred in this case. (In fact, Ms. Buras testified that to her knowledge the Attorney General's office is never contacted as required by § 13:5108.1(b) when Mr. Connick in his official capacity is the subject of a civil rights lawsuit, suggesting that the Orleans Parish District Attorney's office does not actually believe it could be indemnified under the provision.). Second, § 13:5108.1 requires that indemnification occur only when "negligence or other act by an officer or employee" is the subject of the lawsuit. *See* LA. REV. STAT. ANN. § 13:5108.1(b) Presumably, this means to exclude indemnification when the defendant acted willfully, knowingly, or with deliberate indifference. Our review of the record does not reveal with which state of mind the district attorney's office is alleged to have acted.

immunity.[10] The sum of our first inquiry, then, is that damages awarded against the Orleans Parish District Attorney's office are not required under Louisiana indemnification law to come from the state's treasury.

2

Yet this does not end our inquiry. We can still count this factor in favor of Eleventh Amendment immunity if it is nonetheless clear that a judgment will be paid with state funds because the state is responsible for the defendant's general debts and obligations. *See Jacintoport*, 762 F.2d 441. We do not find this to be the case, however.

Our conclusion is best illustrated by examining the 1995 budget of the Orleans Parish District Attorney's

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[10] In *Regents of the University of California v. Doe*, the Supreme Court confronted the question of "whether the fact that the Federal Government has agreed to indemnify a state instrumentality against the costs of litigation, including adverse judgments, divests the state agency of Eleventh Amendment immunity." 519 U.S. at 426. The Court unanimously answered this question in the negative, reasoning that "with respect to the underlying Eleventh Amendment question, it is the entity's potential legal liability, rather than its ability or inability to require a third party to reimburse it, or to discharge the liability in the first instance, that is relevant." *Id.* at 431.

Hudson interprets *Doe* to render indemnification entirely irrelevant for purposes of Eleventh Amendment analysis. While we do not reach the question, we cannot help but notice that the Court made sure to observe that "the question whether a money judgment against a state instrumentality or official would be enforceable against the State is of considerable importance to any evaluation of the relationship between the state and the entity or individual being sued." *Id.* at 430.

office, which totaled about $6.59 million. Of this amount, the State paid approximately $3.7 million, while the City of New Orleans contributed a little more than $1.75 million.[11] Importantly, either all or substantially all of the funds from the State are earmarked for specific purposes, namely salaries for the attorneys working there and for the prosecution costs of child support cases. These funds cannot be used to pay a § 1983 judgment. On the other hand, the funds from the City are discretionary, meaning the office can use those funds for any purpose whatsoever. Moreover, the exact amount of these discretionary funds significantly fluctuates from year to year. Peter Brandt, the Orleans Parish District Attorney's office's executive assistant district attorney, testified that the City was obligated by state statute to fund the operation of the office, and that the exact amount is identified after the office prepares a budget and approaches the city council with a number based on the amount of funding it thinks is needed to run the office properly. Given this, we find it considerably easier to say that the City of New Orleans, rather than the state, is responsible for the general debts and obligations of the Orleans Parish District Attorney's office.

Of course, the City might decline to pay the portions of the budget dealing with the judgment. Putting aside Hudson's contention that the office would be able to compel the City, either though [sic] the state judicial system or through the state legislature, to pay the judgment under LA.REV.STAT.ANN. § 13:5108.1(b), it is within

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[11] The remainder of funds came from the federal government or from private sources.

the realm of possibility that the Orleans Parish District Attorney's office would be forced to go to the state legislature and appear before the appropriate committees in an attempt to have the state treasury pay the judgment. In fact, the office argues, this is what happened when a judgment was rendered against it in *Mairena v. Foti*, 816 F.2d 1061 (5th Cir. 1987).

However, we do not believe this thread arguably connecting the state and the Orleans Parish District Attorney's office is strong enough to bear the weight of the Eleventh Amendment.[12] It is not enough that there be a simple connection between the state and the defendant. Rather, "[w]e must look to see whether the entity " 'stands in the shoes of the state itself.' " *Earles*, 139 F.3d at 1036 (citation omitted). If we cannot say that the Orleans Parish District Attorney's office is the "alter ego" of the state, we cannot provide it the protections of the Eleventh Amendment. *See id.* And this we cannot say. It is

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[12] For one thing, it is woven out of pure speculation. Even ignoring the complexities of the state legislative procedure, and the even more chaotic nature of the budgeting process, we cannot help but notice that after the state paid the *Mairena* judgment, it passed two provisions arguably in an attempt to prevent this event from recurring: (1) § 42:1441.3, which according to Hudson assigns legal liability for such judgments to the City as opposed to the State; and (2) § 42:1441.2(b), which requires that the offices of the district attorney secure general liability insurance for itself and its officers. Remarkably, various officers of the Orleans Parish District Attorney's office testified that they were not even aware of § 42:1441.2(b). At best, the Orleans Parish District Attorney's office can only hope that the state will actually pass the bill it requests when there is an outstanding judgment.

only a remote possibility that the state will elect to pay a judgment against the Orleans Parish District Attorney's office. Moreover, even if we were to assume that a state's voluntary, after-the-fact payment could be considered a "liability" on the state's treasury, the distance between the state and the office "discourages us from conferring immunity." *See Jacintoport*, 762 F.2d at 441-42 (finding the possibility that the State could be liable for a judgment if two other parties defaulted as having "only an ancillary effect on the State treasury" and therefore insufficient for purposes of the Eleventh Amendment).

Having inquired as to the state's liability for both an unfavorable judgment and the office's general debts and obligations, we find that the state is fiscally isolated from the Orleans Parish District Attorney's office. As such, we count this factor against Eleventh Amendment immunity.

C

"The third factor we look to focuses on the degree of local autonomy the entity at issue enjoys." *Pendergrass*, 144 F.3d at 346. Because this case concerns a district attorney's office, we look with particularly keen interest at the amount of freedom the office has in prosecuting cases. *See Crane*, 766 F.2d at 194.

According to the state constitution, the Attorney General can interfere in the prosecution of cases, but only if it has cause and judicial authorization. *See* LA. CONST. art. IV, § 8. Naturally, the parties characterize this provision quite differently. Hudson submits that, in the vast majority of cases at least, Louisiana district attorneys'

offices are completely unsupervised by the Attorney General. In fact, he points out that the Attorney General has never exercised his constitutional authority with respect to the Orleans Parish District Attorney's office. In contrast, the Orleans Parish District Attorney's office characterizes the state constitutional provision as providing the exact level of state oversight needed given the importance of prosecutorial independence.

Weighing these arguments against one another, we find that the balance tilts slightly towards Eleventh Amendment immunity. Louisiana law creates a viable check over the Orleans Parish District Attorney's office, an oversight mechanism by the Attorney General that was entirely absent in *Crane*. *See Crane*, 766 F.2d at 194 (describing TEX. REV. CIV. STAT. ANN. art. 333 (1973) as only requiring reports by the district attorney upon the Texas Attorney General's demand). Nevertheless, the state's involvement is at best infrequent, limited to cases where the state has cause and judicial authorization. This fact cautions us in attaching undue weight to this factor.

D

The next factor we look to is "[w]hether the entity is concerned with primarily local, as opposed to state-wide problems." *Pendergrass*, 144 F.3d at 347. According to Hudson, three facts signal the local focus of the Orleans Parish District Attorney's office: first, that the district attorney is elected by, and accountable only to, voters in the relevant judicial district, *see* LA. REV. STAT. ANN. § 16.1; second, that the state constitution requires the district attorney to have resided in that district for two years, *see*

LA. CONST. art. V, § 26(a), presumably to ensure that the district attorney is intimately familiar with the problems encountered by the people in that district; and third, that the district attorney's prosecutorial powers end at the boundary line of the district in which he serves. In response, the Orleans Parish District Attorney's office points out that it prosecutes crimes against the state, not just Orleans Parish. It is only for the sake of convenience, the office says, that the state legislature decided to divide the state into districts.

As we have twice before dealt with district attorneys' claims of Eleventh Amendment immunity, these arguments are not new ones. We find Hudson's argument persuasive because our case law directs us to the same factors he cites.[13] Our analysis has emphasized two concerns. First, we have found it highly useful to examine the geographic reach of the district attorney's prosecutorial powers. For example, when concluding that Texas district attorneys were local officials we thought it significant that their prosecutorial powers were "limited to the territory of [their] district." *See Crane*, 766 F.2d at 194. On the other hand, when we came to the opposite conclusion with respect to Mississippi district attorneys

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[13] Admittedly, the Orleans Parish District Attorney's office has a point. The crimes it prosecutes are violations of state criminal law as opposed to local ordinances. Yet this fact has not given us pause in the past. *See Chrissy F. by Medley v. Mississippi Dept. of Public Welfare*, 925 F.2d 844, 849 (5th Cir. 1991); *Crane*, 766 F.2d at 194. Indeed, we never even mentioned this fact in Chrissy F. and Crane. As our analysis with respect to this fourth factor did not take this fact into account, we similarly decline to do so in the instant case.

we found it important that the state's law provided them the power to represent the state outside the district. *See Chrissy F. by Medley v. Mississippi Dept. of Public Welfare*, 925 F.2d 844, 849 (5th Cir. 1991). Second, we have looked at whether the district attorney is elected by voters locally or state-wide. *See Crane*, 766 F.2d at 194 (holding that the local election of Texas district attorneys indicated they are local officials).

Conducting these same inquiries, we conclude that the Orleans Parish District Attorney's office is concerned with local problems. First, the parties stipulated to the fact that the Orleans Parish District Attorney has jurisdiction extending only to the limits of the geographical confines of his judicial district. Second, the parties stipulated to the fact that Louisiana district attorneys are elected by only those voters of the judicial district in which they serve. As such, we count this factor against Eleventh Amendment immunity.

E

The fifth factor we look to is the entity's "capacity to sue and be sued." *Earles*, 139 F.3d at 1038. We count this factor against Eleventh Amendment immunity if the entity has these abilities. *See Pendergrass*, 144 F.3d at 347. The parties agree that the Orleans Parish District Attorney's office, as an entity, cannot itself sue nor be sued; rather all suits are brought by or against the district attorney in his official capacity. As we observed earlier, however, the distinction between the entity and an entity's officer sued in his official capacity is irrelevant

for purposes of this Eleventh Amendment inquiry. Thus, this factor cuts against Eleventh Amendment immunity.

F

Finally, our last inquiry concerns whether the entity has the right to hold and use property. *See Pendergrass*, 144 F.3d at 347. If it does, we consider this factor as counseling against Eleventh Amendment immunity. *See id.* The district court found that different facts uncovered in this inquiry pointed in different directions, an assessment with which we agree. The property used by the Orleans Parish District Attorney's office is either in the name of the office (for example, all of the automobiles and computers used by the office) or in the name of the City of New Orleans (for example, the titles to the buildings housing the office). On the other hand, the property used by the Orleans Parish District Attorney's office is subject to the property control laws of the Division of Administration for the State, and the automobiles used by the office were all purchased with funds from the state. Given the conflict, this factor has little effect on our analysis. *See id.*

CONCLUSION

Although the question is a close one given the presence of some facts suggesting a close relationship between the Orleans Parish District Attorney's office and the state, the balance ultimately tilts against Eleventh Amendment immunity. Most importantly, our review of Louisiana law indicates that public funds from the state treasury will not be used to cover an adverse judgment

against the entity. Furthermore, the indications of a close relationship between the Orleans Parish District Attorney's office and the state are at least undermined, if not equaled, by facts suggesting a more distant relationship. After carefully weighing these factors against one another, we conclude that the Orleans Parish District Attorney's office is not an arm of the state. Accordingly, we REVERSE the decision of the district court and REMAND the case to the district court for further proceedings consistent with this opinion.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

KEITH HUDSON	**CIVIL ACTION**
VERSUS	**NO. 95-566**
ATTY. YVONNE HUGHES, ET AL.	**SECTION K**

ORDER

(Filed Sep. 29, 1997)

The Court, having considered the complaint, the record, the applicable law, the Report and Recommendation of the United States Magistrate Judge, and plaintiff's objections to the Magistrate Judge's Report and Recommendation, hereby approves the Report and Recommendation of the United States Magistrate judge and adopts its opinion in this matter with the following added comments.

The Fifth Circuit remanded this action to the magistrate judge for further determination on the entitlement of the Orleans Parish District Attorney's Office to Eleventh Amendment immunity under the factors set forth in *Clark v. Tarrant County*, 798 F.2d 736, 744-45 (5th Cir. 1986) and relevant Louisiana case law. The magistrate judge developed the evidentiary record and his Report and Recommendation contains a thorough analysis under the *Clark* factors.

Plaintiff raises two objections to the magistrate's conclusions. First, he argues that the Fifth Circuit held in *Mairena v. Foti*, 816 F.2d 1061, 1064 n. 1 (5th Cir. 1987), *cert. denied*, 484 U.S. 1005 (1988), that Louisiana district attorneys are not arms of the state and do not enjoy

Eleventh Amendment immunity. Second, he argues that the magistrate erred in concluding under the *Clark* factors that Louisiana district attorneys are arms of the state. The court rejects Plaintiff's objections for the reasons set forth below.

The Fifth Circuit has not directly addressed whether Louisiana district attorneys are arms of the state and entitled to Eleventh Amendment immunity. In *Mairena*, the Fifth Circuit dismissed the district attorney's claim that he was entitled to Eleventh Amendment immunity. In a footnote, the court referenced its decision in *Crane v. State of Texas*, 766 F.2d 193 (5th Cir. 1985), holding that for purposes of § 1983 liability a Texas district attorney was a local government official and not entitled to Eleventh Amendment immunity. *Mairena*, 816 F.2d at 1064, n. 1. The court stated, "We can see no basis to distinguish the Louisiana case from Crane." *Id.*

As number of courts in this district have recognized, the *Mairena* court failed to consider the *Clark* factors and the Louisiana Supreme Court's holding in *Diaz v. Allstate Insurance Co.*, 433 So.2d 699, 701-02 (La. 1983), that the Louisiana district attorney's office is "an office of the state, not local government." *See Smith v. City of New Orleans*, No. 95-0821, 1995 WL 510082, *2 (E.D. La. Aug. 28, 1995); *Carver v. Maoulides*, No. 94-3846, 1995 WL 120085 (E.D. La. Mar. 17, 1995); *Murphy v. Jefferson Sheriffs*, No. 94-1884, 1994 WL 704975 (E.D. La. Dec. 14 1994); *Lopinto v. Blue Ridge Ins. Co.*, No. 94-113, 1994 WL 285017; (E.D. La. June 22, 1994); *Duncan v. Wimberly*, No. 94-211, 1994 WL 285055 (E.D. La. June 21, 1994); *Cinel v. Connick*, No. 92-721 at 22-23 (E.D. La. Aug. 13, 1992).

The precedential value of *Mairena* is unclear in light of Louisiana case law and other Fifth Circuit decisions. The court thus rejects Plaintiff's argument that theses [sic] district courts ignored binding precedent in granting Louisiana district attorneys Eleventh Amendment immunity. For example in *Fireman's Fund Insurance Co. v. Dept. of Transportation and Development*, 792 F.2d 1373, 1375 (5th Cir. 1986), the Fifth Circuit acknowledged that its grant of Eleventh Amendment immunity to the Texas Highway Department was not "controlling" in deciding whether Louisiana's counterpart was also entitled to Eleventh Amendment immunity. *See Smith*, 1995 WL 510082, *2. In this case, the Fifth Circuit recognized both that "Louisiana statutes and case law bear on the question of Eleventh Amendment immunity under the *Clark* analysis," and that *Diaz*, "although of critical importance, may not be fully determinative of the question of Eleventh Amendment immunity." The Fifth Circuit has indicated that its footnote holding in *Mairena*, that Louisiana district attorneys do not enjoy Eleventh Amendment immunity, is not binding in this issue.

As to Plaintiff's second objection, the court revisits one aspect of the magistrate's analysis of the first factor under *Clark*. Whether Louisiana district attorneys enjoy Eleventh Immunity [sic] is dependent on an analysis of state law. *MacMillian v. Monroe Country* [sic], *Alabama*, ___ U.S. ___, 117 S.Ct. 1734, 1737 (1997) (holding that sheriff was policy maker for State of Alabama under state law.) The first *Clark* factor is whether state statutes and case law view the entity as an arm of the state. *Clark*, 798 F.2d at 744-45. In analyzing this issue, the Louisiana Supreme Court holding in *Diaz* has garnered much attention and

his court feels obliged to discuss *Diaz* because the Fifth Circuit questioned whether it is fully determinative of Eleventh Amendment immunity. This court suggests that *Diaz* not determinative of whether Louisiana district attorneys are entitled to Eleventh Amendment immunity.

Diaz involved an indemnification issue. In *Diaz*, plaintiff Diaz sued a district attorney's employee alleging personal injury as a result of the employee's negligence. *Diaz*, 433 So.2d at 700. The district attorney's employee filed a third party demand for indemnity against the State of Louisiana. The State moved for summary judgment under La. R. S. 42:1441(A), which shields the State from liability for damage caused by a district attorney. The trial court denied the State's motion for summary judgment on grounds that the statute was unconstitutional. The Louisiana Supreme Court set aside the finding of unconstitutionality, but affirmed on other grounds. The Louisiana Supreme Court stated that under La.R.S. 13:5108.2, the State was independently obliged to indemnify and hold harmless each employee of the state from financial loss resulting from the employee's alleged negligence while acting in the scope of his employment. *Id.* at 701, La.R.S. 13:5108.2(B). The court held, "[A] district attorney's employee is an employee of the state for purposes of La.R.S. 13:5108.2." *Id*, Thus, the State was not entitled as a matter of law to reject its employee's plea for indemnity. *Id.* at 702.

In determining that a district attorney's office is "an office of the state, not local government," the court stated:

> A district attorney is a constitutional officer who serves in the judicial branch and exercises a portion of the sovereign power of the state within the district of his office. His office, duties, and powers are governed by the constitution and the legislature, and are not subject to local control.

Id. (Citations omitted). This language tends to support a characterization of district attorney's offices as "arms of the state" for purposes of Eleventh Amendment immunity, and the magistrate appropriately factored this into its analysis under the first *Clark* factor. The magistrate found, however, that *Diaz* remains good law. Contrary to the magistrate's finding, this court suggests that *Diaz* has been legislatively overruled,[1] but also opines that this view does not disturb the magistrate's conclusions under *Clark* because neither *Diaz*, nor the legislation overruling

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[1] *See Gibson v. State of Louisiana*, 94-0476 (La. App. 4 Cir. 10/27/94), 644 So.2d 1148, 1151), discussed at note 3, *infra*; *Obermier v. State of Louisiana*, 606 So.2d 937, 939 (La. App. 3 Cir. 1992). The Louisiana Supreme Court has cited *Diaz* approvingly in several cases which do not necessarily bear on whether the district attorney is an arm of the state for Eleventh Amendment purposes. *See Board of Comm'rs v. Connick*, 94-3161 (La. 3/9/95), 654 So.2d 1073, 1076 (District attorney's constitutional right to pursue a criminal investigation and prosecution under state criminal statutes can only be enjoined by a district court in exceptional circumstances, citing *Diaz* in support of district attorney's broad powers: "A district attorney is a constitutional officer who serves in the judicial branch and exercises a portion of the sovereign power with the district of his office.") *cf. City of Baton Rouge v. Ross*, 654 So.2d 1311, 1326 n.24 (La. 1995); *Knapper v. Connick*, 96-0434 (La. 10/15/96), 681 So.2d 944, 946 (*Diaz* cited to support absolute prosecutorial immunity from suit for malicious prosecution).

it is determinative of whether Louisiana district attorneys are arms of the state for Eleventh Amendment purposes.

The primary holding of *Diaz* was that the district attorney's employee is an employee of the state for purposes of La.R.S. 13:5108.2. The relevance of this holding to the issue at hand is limited. *Diaz* addressed a state employee's right to indemnity against the State under La.R.S. 13:5108.2 for negligence liability under state law. As the magistrate wrote,

> In 1984, following *Diaz*, the legislature amended La.R.S. 13:5108.2 to exclude, by reference, district attorneys from any right to indemnification from the State arising out of the district attorney's negligence or other act."

La.R.S. 13:1508.2A(2). Based on a straight forward reading of La.R.S. 13:5108.2, the state no longer indemnifies district attorney's office employees for financial loss resulting from alleged negligence while acting in the scope of employment.

La.R.S. 13:5108.2 is inapplicable to this case. Since Plaintiff has brought a claim under 42 U.S.C. section 1983, the state would indemnify the district attorney's office for costs and damages under La.R.S. 13:5108.1.[2] As the magistrate noted, La.R.S. 13:5108.1 was not amended to

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[2] La.R.S. 13:5108.1. provides:

> It is hereby declared to be the public policy of this state that the state shall hold harmless and indemnify all officers and employees of the state from any financial loss which, for purposes of this Section, shall mean and include court costs, judicial interest, and monetary damages, arising out of any claim, demand, suit, or judgment in federal court brought

exclude district attorneys from the definition of "officers or employees of the State". The Louisiana Supreme Court's characterization in *Diaz* of the district attorney's offices as offices of the state would appear to be relevant to the application of La.R.S. 13:5108.1.[3]

More importantly, Plaintiff has correctly underscored that the State's decision to indemnify district attorney's offices for federal civil rights violations is not dispositive of whether district attorneys are entitled to Eleventh Amendment immunity. *Muhammed v. Board of Supervisors of Southern University*, 715 F.Supp. 732 (M.D. La. 1989), *aff'd*, 9 F.3d 104 (5th Cir. 1993). In *Muhammed*, the court stated,

> It is federal law not state law which shields the state from suit in federal court. . . . The fact that Louisiana, for reasons beyond the ken of this court, has voluntarily elected to indemnify those of its officers who deny or deprive people of

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> pursuant to the provisions of Sections 1981 and 1983 of the Title 42 of the United States Code by reason of alleged negligence or other act by an

officer or employee, provided such officer or employee at the time damages were sustained was acting in the discharge of his duties and within the scope of his employment and that such damages did not result from the intentional wrongful act or gross negligence of such officer or employee.

[3] Since the State of Louisiana is not a nominal defendant, the court does not consider its liability under La.R.S. 42:1441, *et. seq. See Gibson v. State of Louisiana*, 94-0476 (La. App. 4 Cir. 10/27/94), 644 So.2d 1148, 1151 (State not liable for acts of the Orleans Parish District Attorney's Office under La.R.S. 42:1441, *et seq.*; stating that *Diaz* predated statutory amendments and implying that it was legislatively overruled).

> their federal civil rights, in no way constitutes that officer as an "arm" or "alter ego" of the state for Eleventh Amendment purposes.

Id. This view was echoed in *Port Authority Trans-Hudson Corporation v. Feeney*, 495 U.S. 299, 317 n. 10 (1990) (Brennan, J., concurring):

> This Court has not decided which arrangements between a State and a nominal defendant are sufficient to establish that a State is the real party in interest for Eleventh Amendment Immunity purposes. It may be that a simple indemnification clause, without more, does not trigger the doctrine. Lower courts have uniformly held that States may not cloak their officers with a personal Eleventh Amendment defense by promising, by statute, to indemnify them for damages awards imposed on them for actions taken in the course of their employment.

Id. (Citations omitted). Rather, the Eleventh Amendment immunity inquiry is broader. In determining whether the district attorney's office is entitled to Eleventh Amendment immunity, the court looks to the "nature of the entity created by state law" to determine whether the entity is more like a county or city or more like an arm of the State. *Id.* at 313, *citing Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274, 280 (1977). *See also Fireman's Fund Insurance, Co.*, 792 F.2d at 1375. The magistrate's comprehensive analysis under the *Clark* factors embodies this broader approach.

In sum, Louisiana's policy to indemnify district attorneys for section 1983 violations is not determinative of whether those persons are arms of the state entitled to Eleventh Amendment immunity. This court's suggestion

that *Diaz* has been legislatively overruled shall not disturb the magistrate's conclusion, based on his thorough analysis under the *Clark* factors, that Louisiana district attorneys are entitled to Eleventh Amendment immunity. The court therefore rejects Plaintiff's contention that the magistrate judge erred in applying the Clark factors.

Accordingly, for the reasons set forth above and contained in the Report and Recommendation of the United States Magistrate judge,

IT IS ORDERED that the Orleans Parish District Attorney's office be dismissed because of its Eleventh Amendment immunity.

New Orleans, Louisiana, this 29th day of September, 1997.

/s/ Stanwood R. Duval
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

KEITH HUDSON	CIVIL ACTION
VERSUS	NO. 95-0566
ATTY. YVONNE L. HUGHES, ET AL.	SEC. "K" (3)

REPORT AND RECOMMENDATION

(Filed Jun. 3, 1997)

Plaintiff, Keith Hudson,[1] filed this *pro se* and *in forma pauperis* action pursuant to 42 U.S.C. § 1983 against Yvonne Hughes, the City of New Orleans, New Orleans Police Officer John Doe, New Orleans "K-9" Police Officer John Doe, Assistant District Attorney Jane Doe, Assistant District Attorney John Doe and the Orleans Parish District Attorney's Office alleging that the circumstances surrounding his February 22, 1994, arrest and subsequent detention in OPP were unconstitutional.[2] On July 27, 1995, a report and recommendation was issued recommending that plaintiff's *habeas corpus* claims be dismissed without prejudice and that plaintiff's §1983 claims against Susan Richardson and Maurice Landrieu, Assistant District Attorneys of Orleans Parish, the Orleans Parish District Attorney's Office, Yvonne Hughes, the City of New

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[1] Plaintiff filed the captioned lawsuit while incarcerated in the Orleans Parish prison system. Hudson is currently incarcerated at the Hunt Correctional Center, St. Gabriel, LA.

[2] Hudson later amended his complaint by identifying the unknown assistant district attorneys as Susan Richardson and Maurice Landrieu.

Orleans, New Orleans Police officer John Doe and New Orleans "K-9" Police officer John Doe be dismissed with prejudice as frivolous.[3] In so doing, this magistrate judge stated, *inter alia*, that:

> The Orleans Parish District Attorney's Office is . . . immune from civil suit for damages under §1983. The Eleventh Amendment bars actions in federal court against a state or state agency unless the state has consented to be sued. U.S. Const. amend. XI; *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 104 S.Ct. 900, 910, 79 L.Ed.2d 67 (1984); *Alabama v. Pugh*, 438 U.S. 781, 98 S.Ct. 3057, 57 L.Ed.2d 1114 (1978); *Voisin's Oyster House, Inc.*, 799 F.2d 183 (5th Cir. 1986). The Orleans Parish District Attorney's Office is an office within state government.[4] In addition, the State of Louisiana has not waived the District Attorney's Office's immunity or consented to the exercise of federal judicial power in actions against it. *See* La.Rev.Stat.Ann. §13:5106(A) (West 1995). As such, the Orleans Parish District Attorney's office is immune from suit in this Court.

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[3] Rec. Doc. No. 31.

[4] *See* La. Const. art V, §26; La.Rev.Stat.Ann. § 16:1 *et seq.* (West 1995); *Diaz v. Allstate Insurance Co.*, 433 So.2d 699 (La. 1983); *Foster v. Powdrill*, 463 So.2d 891 (La.App.2d Cir. 1985); *see also Dino Cinel v. Harry Connick et al.*, Civil Action No. 92-721 (E.D.La.), Order and Reasons dated August 13, 1992, pp. 20-23, *aff'd on other grounds*, 15 F.3d 1338 (5th Cir.1994); *Wayne Duncan v. Shirley Wimberly, Jr. and Walter Becker*, Civil Action No. 94-0211 (E.D.La.), Order and Reasons dated June 21, 1994, p. 3, *Gerald P. Lopinto v. Blue Ridge Insurance Co. et al.*, Civil Action No. 94-113 (E.D.La.), Minute Entry dated June 22, 1994, p.7.

The district judge approved the report and recommendation, and an order and judgment were entered in favor of defendants on August 18, 1995.[5]

Hudson appealed the United States District Court's judgment.[6] The Fifth Circuit severed the issue of "whether the Orleans Parish District Attorney's Office is immune from suit on the basis of Eleventh Amendment immunity" from the other appealed issues in the case and remanded the severed portion[7] for "further development of both the evidentiary record and the law bearing on the entitlement to immunity of the Orleans Parish District Attorney's office under the Eleventh Amendment of the United States Constitution . . . "[8] In so doing, the Fifth Circuit concluded that the question of whether the district attorney's office qualifies for Eleventh Amendment

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[5] Rec. Doc. Nos. 33 and 34.

[6] Rec. Doc. No. 35.

[7] Rec. Doc. Nos. 37 and 38.

Dane Ciolini, Esq., was appointed to represent Hudson with respect to the Eleventh Amendment issue which is the subject of the instant remand. *See* Rec. Doc. No. 36.

With regard to the remaining portion of the appeal, the Fifth Circuit affirmed the district court's holding that Hudson could not maintain an action brought pursuant to 42 U.S.C. § 1983 alleging false arrest and excessive force where the action, if successful, would render Hudson's convictions invalid. The Fifth Circuit also held that the trial court properly dismissed without prejudice Hudson's unsuccessful Section 1983 claims which could have properly been raised in a habeas proceeding.

[8] Rec. Doc. No. 38.

immunity must be determined under the multi-factored test set forth in *Clark v. Tarrant County*, 798 F.2d 736, 744-45 (5th Cir. 1986) and that the district court should defer to Louisiana's interpretation of its statutes and case law. The Fifth Circuit stated:

> In this respect, we note that certain cases of the Louisiana Supreme Court, although of critical importance, may not be fully determinative of the question of Eleventh Amendment immunity. *See Diaz v. Allstate Insurance Company*, 433 So.2d 699 (La. 1983); *Gibson v. State of Louisiana*, 644 So.2d 1148 (La.App. 4th Cir. 1994). Other Louisiana statutes and case law bear on the question of Eleventh Amendment immunity under the *Clark* analysis. *See, e.g.*, La. Const. art. IV, § 8, art. V, §§ 5(G), 7(B) and 26(B); LSA-R.S. 16:2A, 6, 10, 11, 52, 53, 71; La.R.S. 42:1441.1-1441.3; *Plaquemines Parish Comm. Council v. Perez*, 379 So.2d 1373 (La. 1980); *State v. Neyrey*, 341 So.2d 319 (La. 1976); *Navarre v. Foti*, 562 So.2d 1113 (La. App. 4th Cir. 1991); *Shephard v. City of Baton Rouge*, 588 So.2d 1210 (La. App, 4th Cir. 1991); *City of Baton Rouge v. Short*, 345 So.2d 37 (La. 1977); *Bd. Of Comm'rs of Orleans Levee Dist. V. Connick*, 654 So.2d 1073, 1077 (La. 1995); *State v. Perez*, 464 So.2d 737 (La. 1985); Op.Atty.Gen. Nos. 93-764, Jan. 7, 1994, and 91-341, July 15, 1991. This list of relevant authorities is not intended to be all inclusive.

The case was referred to the undersigned magistrate judge and on March 3, 1997, an evidentiary hearing was held.

Eleventh Amendment immunity[9] extends not only to the State, itself, but also to state instrumentalities and state officers in their official capacities. Therefore, the issue herein is whether the district attorney's office is an "arm of the State partaking of the State's Eleventh Amendment immunity, or . . . a municipal corporation or other political subdivision to which the Eleventh Amendment does not extend." *Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274, 280, 97 S.Ct. 568, 572, 50 L.Ed.2d 471 (1977). "[E]ach state decides the relationship between the state government and the public agencies which it creates." *Fireman's Fund Ins. Co. v. Department of Transportation and Development, State of Louisiana*, 792 F.2d 1373, 1375 (5th Cir. 1986). This Court must consider the following factors in determining whether the district attorney's office qualifies for sovereign immunity: (1) whether state statutes and caselaw view the entity as an arm of the State; (2) the source of the entity's funding; (3) the entity's degree of local autonomy; (4) whether the entity is concerned primarily with local, as opposed to statewide, problems; (5) whether the entity has the authority to sue and be sued; and (6) whether it has the right to hold and use property. *Clark v. Tarrant County*, 798 F.2d 736, 744-45 (5th Cir. 1986); *see also* Rec. Doc. No. 38, p. 2. The defendant agrees that it has the burden of proof with respect to the Eleventh Amendment immunity issue. *See*

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[9] The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State

e.g., Deep Sea Reasearch [sic] *Inc. v. The Brother Jonathan*, 102 F.3d 379, 386 (9th Cir. 1996); *Mancuso v. New York State Thruway Auth.*, 86 F.3d 289, 292 (2d Cir.), *cert. denied*, ___ U.S. ___, 117 S.Ct. 480, 136 L.Ed.2d 375 (1996); *Christy v. Pennsylvania Turnpike Comm'n*, 54 F.3d 1140 (3rd Cir.), *cert. denied*, ___ U.S. ___, 116 S.Ct. 340, 133 L.Ed.2d 238 (1995); *Teichgraeber v. Memorial Union Corp. of the Emporia State Univ.*, 946 F.Supp. 900, 902 (D. Kan. 1996); *see also* Plaintiff's Revised Memorandum In Opposition To Defendant's Motion To Dismiss, p. 3 n.3.

A. **State Statutes and Case Law**

The first *Clark* factor is whether state statutes and caselaw view the district attorney's office as an arm of the State. *Clark*, 798 at 744. The law on this issue is, as plaintiff notes, "a mixed bag."[10]

Defendant argues and numerous constitutional and statutory provisions suggest that the office is an arm of the State. The district attorney derives his power directly from the Louisiana Constitution. La. Const. art. II, § 1, divides the powers of state government into three separate branches: legislative, executive, and judicial. La. Const. art. V, § 26, provides in relevant part:

> (B) **Except as otherwise provided by this constitution, a district attorney, or his designated assistant, shall have charge of every criminal prosecution by the state in his district, be the representative of the state before the grand jury in his district, and be the legal advisor to**

[10] Transcript of evidentiary hearing, p.9, l.20.

> **the grand jury.** He shall perform other duties provided by law.

(emphasis added)

The district attorney for Orleans Parish is specifically provided for in La. Rev. Stat. § 16:71 (West Supp. 1997) which states:

> A. There shall be a district attorney for the parish of Orleans.
>
> B. He shall be elected by the voters of the parish . . . He shall receive an annual salary of fifty thousand dollars, payable monthly by the state treasurer upon the warrant of the district attorney, and such amount as the city of New Orleans shall appropriate, to be paid in equal monthly installments.
>
> C. He shall be a licensed attorney and shall perform sll [sic] duties now prescribed by law or hereafter prescribed by the legislature. He shall appoint the necessary assistants to the district attorney of the parish of Orleans, in accordance with law, who shall be licensed attorneys and the necessary clerks, stenographers and special officers for the district attorney and fix salaries which shall be paid by the city of New Orleans with funds otherwise made available to the district attorney.
>
> D. The city of New Orleans shall provide a sum of not less than one hundred and twenty-four thousand dollars per annum for the payment of the salaries of the assistant attorneys, clerks, stenographers, special officers, and the expenses of the district attorney's office.

> E. The assistant district attorneys, clerks, stenographers and special officers may be removed at the discretion of the district attorney.

Pursuant to La. Rev. Stat. § 13:5108.1A. (West 1991)[11] the State must hold harmless and indemnify district attorneys when a lawsuit arises under 42 U.S.C. § 1983:

> A. It is hereby declared to be the public policy of this state that the state shall hold harmless and indemnify all officers and employees of the state from any financial loss which, for purposes of this Section, shall mean and include court costs, judicial interest, and monetary damages, arising out of any claim, demand, suit, or judgment in federal court brought pursuant to the provisions of Sections 1981 and 1983 of Title 42 of the United States Code by reason of alleged negligence or other act by an officer or employee, provided that such officer or employee at the time damages were sustained was acting in the discharge of his duties and within the scope of his employment and that such damages did not result from the intentional wrongful act or gross negligence of such officer or employee.

Plaintiff argues that the fact that Louisiana has decided to indemnify an employee of the district attorney pursuant to La. Rev. Stat. 13:5108.1 does not cause him to be an arm of the State. *See Muhammed v. Board of Supervisors of Southern University*, 715 F.Supp. 732, 733-34 (M.D. La. 1989), *aff'd*, 9 F.3d 104 (5th Cir. 1993); *see* Plaintiff's Revised Memorandum In Opposition to Defendant's Motion to Dismiss, pp. 8-9 n.8. While this may be true,

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[11] Although Section 13:5108.2 was amended to exclude the district attorney, Section 13:5108.1 has not been so amended.

the fact that the legislature left this hole open is but one more factor supporting the idea that the district attorney's office is an arm of the State.

To further support it's position, district attorneys and assistant district attorneys receive retirement benefits through the district attorney's retirement system which is operated by the State.[12] On several occasions, the Attorney General has opined, *albeit* by negative inference, that the district attorneys' office is a state entity. *See* Op. Atty. Gen. Nos. 93-764, Jan. 7, 1994, and No. ___, July 15, 1991, 1991 WL 575168 (district attorney's office does not have a duty to provide legal representation to a non-state, local political subdivision); *cf* Op. Atty. Gen. No. 95-265, Aug. 10, 1995 (refers to district attorney's office as a state agency or entity).[13]

Plaintiff cites numerous statutory provisions which he suggests establish that the Orleans Parish District Attorney's office is a local entity.[14] Of special significance

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[12] *See* Exh. H, stipulations, No.6. This retirement system is a mandatory system by which deductions are made from the participant's salary (or warrant) pursuant to state law. The District Attorney's office makes additional contributions from its general operating fund. *Id.* The City administers a voluntary medical insurance plan which provides health insurance benefits to the district attorney and his assistants if they choose to obtain it. Exh. H, stipulations, No.7; *see Shephard v. City of Baton Rouge/Parish of East Baton Rouge*, 558 so.2d 1210 (La. 1st Cir. App. 1991).

[13] "Opinions of the Attorney General are not legally binding but only persuasive . . . They are compelling to the extent they speak the law with honesty and skill." Op. Atty. Gen. No. 89-210A, Sept. 8, 1989.

[14] *See* La. Const. art VI, §§ 5 and 7 (reference to district attorneys as "parish officials"); *see* La. Const. art. IV, § 8; *see* La.

is La. Rev. Stat. § 42:1441 (West 1979) which limits the State's vicarious liability and which provides:

> A. The state of Louisiana shall not be liable for any damage caused by a district attorney

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Rev. Stat. § 13:4722 (West 1991) (district attorneys have the right, in the name of the parish, to file suits to abate nuisances); *see* La. Rev. Stat. § 13:5107B. (West 1991) (service proper on district attorney in suits against political subdivisions of the state); *see* La. Rev. Stat. § 13:5109 (West Supp. 1997) and Exh. H, stipulations, No. 39 (district attorney can advise the governing authority of the parish on compromising or settling any claim against the parish); *see* La. Rev. Stat. 16:2A. (West 1982) and Exh. H, stipulations, No.9 (district attorneys of all judicial districts, other than the parish of Orleans, can act ex officio as the regular attorney and counsel for the police juries, parish school boards, city school board and certain state boards and commissions); *see* La. Rev. Stat. 16:62 (West Supp. 1997) (district attorneys in most districts must call referendum in order to obtain authorization from the voters to levy an ad valorem property tax); *see* La. Rev. Stat. § 16:63 (West Supp. 1997) (all such tax receipts are held and disbursed by the local district attorney); *see* La. Rev. Stat. § 16:65 (West Supp. 1997) (giving most Louisiana district attorneys the power to borrow and to issue certificates of indebtedness payable from their general revenues for the purpose of buying, building, renovating, expanding, equipping and furnishing the facilities they require); *see* La. Rev. Stat. § 18:602 (West 1996) (district attorneys referred to in section addressing the filling of vacancies in certain local and municipal offices); *see* La. Rev. Stat. § 42:1441.3C. (West 1997) (distinguishing "public" and "state" officers); La. Const. art.4, § 8, provides that the Attorney General, as chief legal officer of the state, has the "authority (1) to institute, prosecute, or intervene in any civil action or proceeding; (2) upon the written request of a district attorney, to advise and assist in the prosecution of any criminal case; and (3) for cause, when authorized by the court . . . (a) to institute, prosecute, or intervene in any criminal action or proceeding, or (b) to supersede any attorney representing the state in any civil or criminal action;" *see also* La. C. Cr. P. art. 91 (West Supp. 1997).

> . . . within the course and scope of his official duties, or damage caused by an employee of a district attorney . . . B. The provisions of Subsection A hereof are not intended to and shall not be construed to affect any personal liability which may arise from damage caused by . . . a district attorney . . . nor shall the provisions of said Subsection A be construed to amend or repeal R.S. 13:5108.1.

In 1985, the Legislature added certain provisions to Title 42 to further define master-servant tort liability and the concept of *respondeat superior* under state law. These provisions exclude by reference the district attorneys' offices and employees.

> § 1441.1 Nonimposition of master-servant liability on state by Civil Code Article 2320 and other laws for torts of persons not designated state officials, officers or employees by R.S. 13:5108.2
>
> Civil Code Article 2320 and other laws imposing liability on a master for the offenses and quasi offenses of his servant shall not extend or apply to and shall not impose liability on the state for the offenses and quasi offenses of any person who is not expressly specified by R.S. 13:5108.2(A)[15] to be an official, officer, or employee of state entitled to indemnification under R.S. 13:5108.2.

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[15] La. Rev. Stat. § 13:5108.2A.(2) (West 1996), via reference to La. Const. art. VI, §§ 5(G) and 7(B), excludes district attorney's offices from the protections of Section 42:1441. La. Const. Art. V, § 26(B) refers to district attorneys.

> § 1441.2 Nonimposition of master-servant liability on state by Civil Code Article 2320 and other laws for torts of parish officials . . . ;
>
> A. Civil Code Article 2320 and other laws imposing liability on a master for the offenses and quasi offenses of his servant shall not extend or apply to and shall not impose liability upon the state for the offenses of any of those public officers named in Article V, Sections 26 . . . of the Constitution of Louisiana or any of their officers, deputies, assistants, employees, appointees, designees, or representatives.

(West 1990).[16]

Section 1441.4(2)[17] states that certain cases such as "*Foster v. Hampton*, 352 So.2d 197 (La. 1977) and 381 So.2d 789 (La. 1980)" (sheriff is officer and employee of the State of Louisiana), "*Mullins v. State*, 387 So.2d 1151 (La. 1980)" (coroner's office is state agency), and "*Hrychorchuk v. Smith*, 390 So.2d 497 (La. 1980)" (constables are state officers) "represent misinterpretations and misapplications of Civil Code Article 2320 and other laws imposing liability on a master for the offenses and quasi offenses of his servant." The caselaw is no less conflicting.

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[16] *See also* La. Rev. Stat. §§ 42:1441.1 et seq (West Supp. 1997).

[17] Section 42:1441.3 sets forth determinants by which a political subdivision may be made liable as master for the offenses of various public officers of a political subdivision. Section 42:1441.3C. also states that the term "public officer" includes anyone who holds any elective or appointive office created by constitution or law, but that this term is not synonymous with "state officer."

After the enactment of Section 42:1441 (West 1979), the Louisiana Supreme Court held that the district attorney is "a constitutional officer who serves in the judicial branch and exercises a portion of the sovereign power of the state within the district of his office." *Diaz v. Allstate Insurance Company*, 433 So.2d 699, 701 (La. 1983); *cf Knapper v. Connick*, No. 96-0434 at *3, 681 So.2d 944, ___ (La. 1996). The *Diaz* court stated that "[r]egardless of whether La.R.S. 42:1441 is constitutional and shields the state from liability to tort victims, the state is independently obliged by La.R.S. 13:5108.2 to indemnify and hold harmless each employee of the state from financial loss arising out of claim, suit or judgment by reason of the employee's alleged negligence while acting in the scope of his employment." At the time of the *Diaz* decision, La. Rev. Stat. 13:5108.2B. (West 1982) provided that:

> It is hereby declared to be the public policy of this state that the state shall hold harmless and indemnify each official, officer, and employee of the state from any financial loss which, for purposes of this Section, shall mean and include court costs, judicial interest and monetary damages, arising out of any claim, demand, suit or judgment in any court by reason of alleged negligence or other act by the official, officer or employee, if the official, officer or employee, at the time damages were sustained, was acting in the discharge of his duties and within the scope of his office or employment and such damages did not result from the intentional wrongful act or gross negligence of the official, officer or employee.

In 1984, following *Diaz*, the legislature amended La. Rev. Stat. 13:5108.2 to exclude, by reference, district attorneys

from any right to indemnification from the State arising out of the district attorney's negligence or other act.[18]

In *Mairena v. Foti*, 816 F.2d 1061, 1064 n.1 (5th Cir. 1987), *cert. denied sub nom Connick v. Mairena*, 484 U.S. 1005, 108 S.Ct. 697, 98 L.Ed.2d 649 (1988), the Fifth Circuit dismissed the Orleans Parish District Attorney's claim that he was entitled to Eleventh Amendment immunity.[19] Further, two Louisiana appellate courts have held that the district attorney's office is not a state agency. *Gibson v. State of Louisiana*, 644 So.2d 1148, 1150 (La. App. 4th Cir.

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[18] As amended, Section 13:5108.2A(2) states

> As used in this Section, an "official", "officer", or "employee" of the state does not include . . . the parish officials set forth and named in Article VI, Sections 5(G) or 7(B) of the Constitution of Louisiana . . .

La. Const. art. VI, § 5(G) states:

> No home rule charter or plan of government shall contain any provision affecting . . . the offices of district attorney . . .

La. Const. art. VI, § 7(B) states:

> Nothing in this Section shall affect the powers and functions of a school board or the offices of the district attorney . . .

[19] The *Mairena* court stated in a footnote:

> The district attorney argues that Mairenas suit is barred by the eleventh amendment. This court addressed that contention in *Crane v. State of Texas*, 766 F.2d 193 (5th Cir. 1985), and held that for purposes of section 1983 liability, a Texas district attorney was a local government official. **We can see no basis to distinguish this Louisiana case from Crane**.

(emphasis added)

1994) (suggesting that *Diaz* was overruled by La. Rev. Stat. Ann. §§ 14:1441.1,.2, and .3 (West 1990)); *Obermier v. State of Louisiana*, 606 So.2d 937, 939 (La. App. 3rd. Cir. 1992) ("If a party is seeking recovery for damages against a district attorney of the state of Louisiana, the path of recourse does not lead to the state"). Several Attorney General opinions also support plaintiff's position. *See* Op. Atty, Gen. No. 90-194, May 25, 1990 ("district attorneys and their employees are considered employees of their respective parishes although district attorneys exercise constitutional and statutory authority") and No.89-210A, September 8, 1989 (assistant district attorneys are public officials and employees of the parish or parishes constituting the judicial district in which they serve).

Several United States District Judges in the Eastern District of Louisiana have held that a Louisiana district attorney is immune from suit in his official capacity and have distinguished *Mairena* because it failed to consider *Diaz* or to apply the *Clark* factors. *Smith v. City of New Orleans*, No. 95-0821, 1995 WL 510082 (E.D.La. Aug. 28, 1995) (Vance,J.); *Carver v. Maoulides*, No. 94-3846, 1995 WL 120085 (E.D.La. Mar.17, 1995) (Duval,J.); *Murphy v. Jefferson Sheriffs*, No. 94-1884, 1994 WL 704975 (E.D.La. Dec. 14, 1994) (Duval,J.); *Lopinto v. Blue Ridge Ins. Co.*, No. 94-113, 1994 WL 285017 (E.D.La. June 22, 1994) (Carr,J.); *Duncan v. Wimberly*, No. 94-0211, 1994 WL 285055 (E.D.La. June 21, 1994) (McNamara,J.); *Cinel v. Connick*, No. 92721, unpublished opin. (E.D.La. Aug. 13, 1992) (Feldman,J.). Even more recently, the Louisiana Supreme Court cited *Diaz* with approval in *Board of Comm'rs v. Connick*, 654 So.2d 1073, 1077 (La. 1995).

The above-referenced statutory provisions and case-law create a dichotomy. Supporting defendant's position that the office of the district attorney is an arm of the State rather than a local entity are several arguments. The district attorney derives his power directly from the Louisiana Constitution and he is legislatively mandated to prosecute all criminal matters in his district, to be the representative of the State before the grand jury in his district, and to be the legal advisor to the grand jury.[20] The stature of the office of the district attorney as a state entity "is one of constitutional import, since the Louisiana Constitution of 1974 expressly accords to the legislature, and not to local governments, the exclusive right to define felonies and to the district attorneys the exclusive right to prosecute them." *City of Baton Rouge v. Ross*, 654 So.2d 1311, 1319 (La. 1995); *see also Board of Commissioners v. Connick*, 654 So.2d 1073, 1077 (La. 1995). Further, inasmuch as the highest court in the State has held the district attorney's office to be a state entity, and that case has not been judicially overruled, *Diaz* still appears to be good law.

Although plaintiff maintains that the legislature amended La. Rev. Stat. § 14:1441 in 1985, following the

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[20] La. Const. art. V, § 26. In Louisiana, "the legislature has traditionally enjoyed plenary power over the determination and definition of acts which are punishable as crimes.' " *City of Baton Rouge v. Ross*, 654 So.2d 1311, 1320 (La. 1995) (quotations omitted). The Louisiana Supreme Court has made it clear "that municipalities may not impinge upon the prerogative of state government to protect define and prosecute state crimes." Defendant's Supplemental Memorandum of Law, p.15; *see City of Baton Rouge v. Short*, 345 So.2d 37, 40 (La. 1977).

Diaz decision, to "specifically [go] after what the Diaz Court did," the legislative history of these amendments does not mention *Diaz*. Transcript of evidentiary hearing, p. 6, l.9. La. Rev. Stat. § 14:1441.1-3. The absence of a reference to *Diaz* weakens plaintiff's contention inasmuch as the legislature specifically named other cases it intended to statutorily overrule. *See* La. Rev. Stat. 14:1441.4 (West 1985).

Even though it appears that the Fifth Circuit in *Mairena* has spoken to this issue, the *Mairena* court failed to consider the *Clark* factors or the *Diaz* holding when it cited a case based on Texas law in support of its contention that the office of the district attorney was a local office. *Mairena*, 816 F.2d at 1064, n.1. As a judge from this district stated, "*Mairena* is of little precedential value to the Court in its determination of the Eleventh Amendment status of the district attorney's office – a decision that the Supreme Court and the Fifth Circuit have insisted be made with reference to Louisiana law. *See Mount Healthy, supra; Clark, supra.*" *Cinel v. Connick*, No. 92-721, p. 23 n.14, unpublished opin. (E.D.La. Aug. 13, 1992) (Feldman,J.). Inasmuch as this "Court's role in this context is to decide the status of an agency according to the laws of the state that created it, . . . the Court cannot ignore a plain pronouncement, directly on point, by the highest court of the state . . . *Diaz* is controlling." *Id.*

B. Funding

The second *Clark* factor considers the sources of funding for the district attorney's office and the related

issue of whether the State must fund any federal judgment rendered against that office. *Clark*, 798 F.2d at 744. The sources of funding of the Orleans Parish District Attorney's office are diverse. *See* Exh. B, Orleans Parish District Attorney's Office Funding Sources 1985-1996;[21] *see also* Exh. B, transcript from evidentiary hearing.

To understand the revenue sources, the year 1995 will be used as an example herein. In 1995, the Orleans Parish District Attorney's Office received $1,757,714 from the City of New Orleans, $477,103 from private sources, $2,255,000 from the State in the form of warrants, $258,735 in block grants from the federal government, $134,485 from a federal "Target Cities" grant, and $1,592,493 from a State child support reimbursement contract. *Id.*

There are several sources from which the district attorney's office receives discretionary income and from which a judgment could theoretically be paid. First, revenue provided the office by the City of New Orleans goes into the office's general operating fund and there are no limitations placed on how these funds may be used.[22]

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[21] This document was prepared by the chief fiscal officer of the Orleans Parish District Attorney's office.

[22] The city is mandated by the state legislature to fund the operation of the district attorney's office. *See* Exh. E, p.9. This amount is determined in the following manner. The district attorney's office prepares a budget based on the "amount of funding that [they] think [they] need to properly run the office." It then submits this budget to the city council and the budget committee which consider the request and reply with an amount that, based upon city revenues, the council considers appropriate. *Id.*

Exh. E., p.9; Exh. H, stipulations, No.29. Another source of discretionary income comes to the office via "statutory income." The legislature has enacted various state statutes which entitle the district attorney's office to share in monies which emanate from private sources such as fines, fees, forfeitures and the like. Exh. E, pp. 13-19.

On the other hand, other revenue sources are considered non-discretionary income as they are earmarked for specific uses. For example, amounts received from the State in the form of warrants may only be used for district attorneys' salaries.[23] *Id.*, p. 12. These salary checks are issued from the State treasury and are made payable to the individual district attorneys. *See* Exh. H, stipulations, No.26. Revenue received from federal grants is also specifically earmarked for particular uses. *See* Exh. E, p.20 (i.e., funds received for the LCLE block grants generally must be spent under the terms and conditions of the grant).

In *Regents of the University of California v. John Doe*, ___ U.S. ___, ___, 117 S.Ct. 900, 902, 137 L.Ed.2d 55 (1997), the United States Supreme Court considered the narrow issue of "whether the fact that the Federal Government has agreed to indemnify a state instrumentality against the

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[23] The state must pay district attorneys throughout the State an annual salary of fifty thousand dollars and must pay each assistant district attorney thirty thousand dollars a year. La. Rev. Stat. §§ 16:10 and 16:11 (West Supp. 1997). As additional compensation for their services, the assistant district attorneys shall receive "an annual salary as fixed by existing statutes and paid by the governing authority of the parish or parishes composing the judicial district." La. Rev. Stat. § 16:52. (West 1982).

costs of litigation, including adverse judgments, divests the state agency of Eleventh Amendment immunity." The Court held that "with respect to the underlying Eleventh Amendment question, it is the entity's potential legal liability, rather than its ability or inability to require a third party to reimburse it, or to discharge the liability in the first instance, that is relevant." *Id.*, ___ U.S. at ___, 117 S.Ct. at 904; *e.g., Jacintoport Corp. V. Greater Baton Rouge Port Comm'n*, 762 F.2d 435, 440 (5th Cir. 1985) ("One of the most important goals of the immunity of the Eleventh Amendment is to shield states' treasuries . . . The purpose of immunity therefore largely disappears when a judgment against the entity does not entail a judgment against the state.")(citations omitted), *cert denied sub nom Greater Baton Rouge Port Commission v. Jacintoport*, 474 U.S. 1057, 106 S.Ct. 797, 88 L.Ed.2d 774 (1986).[24]

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[24] Although not dispositive of this issue, the Court does note that neither the City of New Orleans nor the Parish of Orleans has ever paid a judgment rendered against the District Attorney's office, the District Attorney or any of his employees. *See* Exh. H, stipulations, No. 21. Peter Brandt, Executive Assistant District Attorney for the Parish of Orleans, testified that in the event of a judgment against the district attorney's office, the actual scenario would be that the "office would go to the state Legislature in Baton Rouge and appear before the appropriate committees and attempt to have a bill introduced which would be enacted to have the state treasury pay the judgment." Exh. E,.Depo., p.41. This is exactly what transpired in *Mairena v. Foti*, 816 F.2d 1061 (5th Cir. 1987), *cert. denied sub nom Connick v. Mairena*, 484 U.S. 1005, 108 S.Ct. 697, 98 L.Ed.2d 649 (1988), which is the only case in which the district attorney's office was held not to enjoy Eleventh Amendment immunity. *See* Exh., E, pp 46-47; *See also* Exh. H, stipulations, No.20; *see also* Exh. C, Answers to Plaintiff's First Set of Interrogatories, No. 2.4, p. 4. Plaintiff maintains that "such a voluntary

The Legislature has passed various laws which provide the district attorney's office with funding. Without this State involvement, the office would have no revenue. *See e.g.*, Exh. E, pp. 8-9 ("The City of New Orleans is mandated by the state legislature, who passed laws which require the city to fund the operation of the district attorney's office in Orleans Parish").

In addition, defendant points out that funding that the Orleans Parish District Attorney's Office receives is commingled, with the exception of warrants paid directly by the State to the individual district attorneys. *See* Defendant's Memorandum of Law, p. 17. All sources of discretionary income are factored into the preparation of the district attorney's annual budget and "[t]o compel payment of a judgment . . . not figured into the budget" may implicate the Eleventh Amendment. *Id; cf Jagnandan v. Giles*, 538 F.2d 1166 (5th Cir. 1976), *cert. denied*, 432 U.S. 910, 97 S.Ct. 2959, 53 L.Ed.2d 1083 (1977) (compelling payment of a judgment from tuition fees which had been

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appropriation does not implicate the Eleventh Amendment." Plaintiff's Revised Memorandum in opposition to Defendant's Motion to Dismiss, p.13 n.12. It is unclear whether the Legislature's willingness to appropriate such funds actually acknowledges that the State has legal liability to pay the judgment. However, it does indicate that the Legislature *may* appropriate funds to pay a future judgment in the same way that it did in *Mairena*. Furthermore, in the event that the Legislature does not appropriate such funds, it is unclear whether a judgment would be paid from State or City discretionary funds, whether this amount would be apportioned between the two, or whether one fund would first be satisfied before dipping into the other fund.

already factored into the preparation of the annual budget would add an expenditure not figured into the budget and, therefore, is barred by the Eleventh Amendment).

C. State v. Local Autonomy

Plaintiff argues that the district attorney's office primarily enjoys local autonomy inasmuch as: (1) the State cannot compel district attorneys to indict, prosecute, dismiss, plea bargain, settle or compromise any civil or criminal action; (2) district attorneys have the authority to select, hire and terminate their assistant district attorneys and other personnel; (3) no State official has ever vetoed or preapproved the current District Attorney's personnel decisions; (4) Louisiana district attorneys have the autonomy to set the salaries for their assistants and staff; and (5) district attorneys are elected only by those voters in the judicial district in which they serve. *See* Plaintiff's Revised Memorandum in Opposition to Defendant's Motion to Dismiss, p. 20; *see also* Exh. H, stipulations, Nos. 32, 4, 3 and 33. The District Attorney of Orleans Parish has jurisdiction extending only to the limits of his judicial district and prosecutes cases only in Orleans parish. *See* Exh. H, stipulations, Nos. 33-34.

Defendant argues that the district attorney's office is free from local control. It states that La. Const. arts. VI, §§ 5(G) and 7(B) provide that local governing authorities may not interfere with the powers and functions of the district attorney's office. The State "exercises supervision and control over the hiring and termination of [the assistant district attorneys) and employees to the extent that State law authorizes district attorneys to select assistants

and other personnel." Exh. C, Answers to Plaintiff's First Set of Interrogatories, No. 2.6.1., p. 6 (citing La. Rev. Stat. 16:1A. (West Supp.1997)). The State also establishes the qualifications and minimum number of assistant district attorneys allowed in Orleans Parish. La. Rev. Stat. 16:51 (West Supp. 1997). Defendant argues that the State controls the number of judicial districts, the number of district attorneys, the sources of funding for district attorneys' offices, the types of conduct that are considered criminal and that may be prosecuted by district attorneys, as well as the powers and duties of district attorneys.

Defendant brings to the Court's attention the fact that the State can alter its warrants at any time as far as salary, pay raises and pay reductions for district attorneys are concerned, with the exception that the district attorney's salary and retirement benefits may not be diminished during his or her term of office. *See* Exh. C, Answers to Plaintiff's First Set of Interrogatories, No. 2.6.6.,p. 8 (citing La. Const. art. 5, § 31). The State has enacted an election code by which district attorneys are elected. La. Rev. Stat. § 18:1401 et seq. (West Supp. 1997). In addition, district attorneys may be removed from office only in the manner prescribed by state law. La. Rev. Stat. § 16:2C. (West 1982); *see* Exh. C, Answers to Plaintiff's First Set of Interrogatories, No. 2.6.1, p. 6; La. Const. art. V, § 30 provides for the sequence of events that occurs in the event of a vacancy in the district attorney's office. *See* La. Rev. Stat. 18:602C. (West Supp. 1996). The Louisiana Legislature defines the jurisdictional boundaries of each district attorney in the State. Exh. D, pp. 10-12.

The only entity that has any supervisory control over the office is the Attorney General of Louisiana. *See* Exh. D, p. 13; La. Const. art. IV, § 8; *see* La. C.Cr.P. arts. 61 and 62 (West 1991). Although La. Const. art, V, § 26, states that the district attorney, or his designated assistant, has charge of every criminal prosecution in his district, art. IV, § 8, grants the Attorney General limited authority in certain criminal cases. *See e.g., State v. Neyrey,* 341 So.2d 319, 324 (La. 1976); *see e.g., State v. Perez,* 464 So.2d 737, 744 (La. 1985).

Louisiana law provides several methods by which to circumscribe a district attorney's exercise of his authority. La.C.Cr.P.680 (West 1981) provides for mandatory recusation of a district attorney in certain instances. *See Plaquemines Parish Commission Council v. Perez,* 379 So.2d 1373, 1375-76 (La. 1980). La. Const. art. IV, § 8, empowers the Attorney General for cause, when authorized by the trial court, to institute, prosecute, or intervene in any criminal action or to supersede the district attorney. In addition, La. Const. art. X, § 25 and La. Rev. Stat. §§ 42:1411-12A. (West 1990), "empower the attorney general to institute suit for removal of a district attorney who is convicted of a felony while in office." *Id.* at 1377. La. Const. art. X, § 24 provides that district attorneys may be impeached by the Legislature for commission or conviction of a felony or for malfeasance or gross misconduct while in office. *See Perez v. Plaquemines Parish Comm'n Council,* 391 So.2d 1308, *writ refused,* 397 So.2d 805 (La. App. 4th Cir. 1980) (Parish Commission Council had no authority to investigate the district attorney in connection with his impeachment or removal since those procedures must be initiated and conducted by the Legislature and

Attorney General respectively). Furthermore, pursuant to La. Const. Art. X, 9 26, the Governor may order an election pursuant to a petition from the electorate to recall a district attorney. *Plaquemines Parish Comm'n Council v. Perez*, 379 So.2d at 1377.

Plaintiff contends and the testimony reveals that the State has never made any effort to interfere with or to direct the prosecution or dismissal of any case handled by the current Orleans Parish District Attorney. Exh. D, pp. 13, 14 and 16. The Attorney General has, however, judicially asserted his powers under article IV, § 8(3), albeit not in Orleans Parish, on at least two occasions. In 1981, he sought judicial authorization to supersede the district attorney of Plaquemines Parish. *In the Matter of Attorney General William J. Guste, Jr. Superseding the District Attorney of the Twenty-Fifth Judicial District*, 454 So.2d 806 (La. 1981). In 1989, he twice sought judicial authorization to supersede the district attorney of East Baton Rouge Parish. *In re: the Matter of Attorney General William J. Guste, Jr. Superseding the District Attorney of the Nineteenth Judicial District*, No. 12-88-103 on the docket of the Nineteenth Judicial District Court, writ denied, No. KW 89-0088 (La. App. 1st Cir. 1989), writ denied, No. KW 89-0271 (La. App. 1st Cir. 1989), writ granted, 538 So.2d 606 (La. 1989), writ denied, No. KW 89-0271 (La. App.1st Cir. 1989), writ denied, 541 So.2d 903 (La. 1989). These two instances in which the Attorney General became involved in a district attorney's prosecutorial decisions indicate that the State has the power to and will intervene against a district attorney when the Attorney General deems it appropriate to do so.

The Louisiana Supreme Court has recognized two scenarios where it has approved a lower court's decision to stay a district attorney's investigation prior to the initiation of prosecution in a court of criminal jurisdiction. *Board of Commissioner of the Orleans Levee District v. Connick*, 654 So.2d 1073, 1077 (La. 1995). The first scenario arises when a district attorney attempts to prosecute a prospective defendant under a statute that is "manifestly unconstitutional" or invalid on its face. *Id.* at 1077-78, citing *Knights of Columbus v. Louisiana DPS*, 548 So.2d 936, 938 (La. 1989); *Plaquemines Parish Comm'n Council v. Perez*, 379 So.2d 1373, 1384-85 (La. 1980) (citations omitted). The second scenario arises when a district attorney is found to have abused the powers of his office by subjecting an individual to an harassing investigation without any good faith belief that the individual had committed any crime. *Id.* at 1078, citing *In re Grand Jury Subpoenas Issued to Certain Members of Orleans Levee District*, 95-KK-0042, 648 So.2d 864 (La. 1995) (per curiam). The Court stated "[i]n the absence of one of these . . . [scenarios], however, a court exercising civil jurisdiction cannot restrain the district attorney from the exercise of his constitutional powers." *Id.* at 1079.

D. State v. Local Concerns

The fourth *Clark* factor relates to whether the Orleans Parish District Attorney's Office is concerned primarily with local or state problems. *Clark*, 798 F.2d at 745. Plaintiff argues that because Louisiana district attorneys are elected by and accountable only to those voters of the judicial district in which they serve, they are concerned primarily with local concerns. *See* Plaintiff's Revised

Memorandum in Opposition to Defendant's Motion to Dismiss, p. 21 (citing La. Rev. Stat. § 16:1 (West Supp. 1997). He notes that the district attorney is elected solely by the registered voters of Orleans Parish. Plaintiff argues that the requirement that the district attorney must reside in his district prior to running for office implies, therefore, that the Legislature intended the district attorney's office to be concerned with local affairs. *Id.*; *see* Exh. H, stipulations, No. 24; La. Const. art. V, § 26(A). In addition, plaintiff states that because the Orleans Parish District Attorney prosecutes cases only in Orleans Parish and because he is elected by the constituents of Orleans Parish, he is concerned only with local problems.

Defendant contends that these judicial regions or district were only created as a matter of convenience and that "the district attorneys' powers and duties . . . are coextensive with and concern the state." Defendant's Memorandum of Law, p. 22, quoting Op. Atty. Gen. No. 81-1016-A; *see* Op. Atty. Gen. No. 83-13; *cf In re Louisiana Riverboat Gaming Commission*, 659 So.2d 775, 781 (La. App. 1st Cir. 1995) ("[T]he attorney general and the district attorneys were charged by statute with the same duties within their respective judicial districts . . . ").

To assume that a district attorney is a local official merely because his territory is confined to one particular parish is superficial. A district attorney prosecutes activity which the State has decided is criminal and any local involvement results from the fact that judicial districts were set up as convenient organizational units pursuant to which each district attorney's office could operate expeditiously and effectively.

E. Authority to be Sued or Sue in Own Name

The fifth *Clark* factor is whether the Orleans Parish District Attorney's office has the authority to sue or be sued in its own name. *Clark*, 798 F.2d at 745. Both parties admit that the Orleans Parish District Attorney has been sued in his own name in his official capacity in Civil District Court. Exh. H, stipulations, Nos. 36 and 42. Defendant argues that although this *Clark* factor is a relevant inquiry, it is not dispositive of the issue herein. Defendant notes that there is no legal entity by the name of the Orleans Parish District Attorney's Office and that in civil suits, the appropriate defendant would always be the Orleans Parish District Attorney in his official capacity as District Attorney for Orleans Parish. *E.g., Riley v. Evangline Parish Police Jury*, 637 So.2d 395 (La. 1994) (sheriffs, rather than their offices, are proper defendants).

Plaintiff contends that the large number of civil cases brought by or against district attorneys in their official capacities evidence that the Orleans Parish District Attorney can and should have been sued in his own name. He notes further that "true arms of the State of Louisiana, such as the Louisiana Department of Transportation and Development, the Louisiana Department of Wildlife and Fisheries and the Louisiana Department of Health and Hospitals, are not sued in the names of their secretaries, but always in the name of the state or in the name of their respective agency." Plaintiff's Revised Memorandum in Opposition to Defendant's Motion to Dismiss, p. 22.

Although no cases were found dealing with the district attorney's office and this issue, by analogy the Louisiana Supreme Court has stated with respect to sheriffs'

offices that a suit against a sheriff's office "raised claims against the sheriff in his official capacity." *Riley v. Evangline Parish Police Jury*, 637 So.2d 395 (La. 1994).

F. Right to Hold and Use Property

The final *Clark* factor is whether the entity in question has the right to hold and use property. Plaintiff notes that title to the two buildings used to house the Orleans Parish District Attorney's office is held by the City of New Orleans, rather than by the State, and that the 40 plus vehicles used by that office are not titled in the name of the State. Plaintiff concludes that because all the movable and immovable property used by the Orleans Parish District Attorney's Office is either titled in the name of the office or in the name of the City, "it is clear that a Louisiana district attorney can hold and use property titled (1) in the name of the *local entity* from which he receives funding and other assistance, and (2) in the name of his own office." Plaintiff's Revised Memorandum in Opposition to Defendant's Motion to Dismiss, p. 23.

Defendant contends that district attorneys, in their official capacities, may not purchase buildings in the name of the district attorney or donate property acquired by their offices. It states that district attorneys' offices are subject to the property control laws of the Division of Administration for the State of Louisiana and that district attorneys have authority to sell surplus property only with the permission of the State. It further notes that the vehicles used by the Orleans Parish District Attorney's Office are placed in the name of "the Orleans Parish

District Attorney's Office, State of Louisiana" and are issued license plates for state offices.

Peter Brandt testified that the Orleans Parish District Attorney's office does not pay rent for use of the building, nor does it pay an electric, utility, or water bill. Exh. D, pp. 48-49. He further testified that the telephone bill is paid from the general operating fund. *Id.* Brandt stated that the 40 plus vehicles owned by the Orleans Parish District Attorney's Office were originally purchased by the Child Support Enforcement Division of this office. *Id.* at 52. The monies that the district attorney's office receives under that child support program come directly from the State.[25] *Id.* at 28. In addition, the office holds credit cards which it allows individual employees to use. Exh. D, p. 54; Exh. H, stipulations, No. 31. In the event the district attorney needed capital expenditures to finance a new office building, the district attorney's office would approach the State Legislature and request that the necessary funds be placed in the State budget. Exh. C., Defendant's Answers to Plaintiff's First Set of Interrogatories, No. 2.6.4, p. 7.

Conclusion

In conclusion, with respect to the first *Clark* factor, the district attorney's office is created by the Louisiana Constitution. The highest court in the State has held that a district attorney's office is an office under State, rather than local, control. *Diaz v. Allstate Insurance Co*, 433 So.2d

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[25] Both parties agree that the State funds certain equipment purchases through state grants. Exh. H, stipulations, No. 19.

699, 701 (La. 1983). The Louisiana Supreme Court continues to cite *Diaz* and *Diaz* has not been judicially overruled. Although, the enactment of La. Rev. Stat. §§ 42:1441.1 et seq. and the amendment of La. Rev. Stat. 13:5018.2 weakens *Diaz*, the legislative history set forth in Section 42:1441.4 fails to include the *Diaz* case in its discussion of cases that La. Rev, Stat. §§ 42:1441.1-.4 were intended to legislatively overrule. Furthermore, the Legislature left untouched La. Rev. Stat. § 13:5018.1 wherein the State must still indemnify an employee of a district attorney's office in the event a judgment is entered against him or her in a lawsuit brought pursuant to 42 U.S.C. §§ 1981 or 1983.

An analysis of the second *Clark* factor reveals that it is unclear who bears legal liability in the event of a judgment against the Orleans Parish District Attorney's Office. In all probability, the District Attorney's office would approach the Legislature with a special budgetary request for funds to pay such a judgment. However, if the Legislature refused to appropriate such funds, the district attorney's office would have to look to State and/or City discretionary funds.[26] Without State involvement in the funding of the District Attorney's Office, i.e., the passage of state laws, the District Attorney's Office would have no revenue.

With respect to the third *Clark* factor, the Orleans Parish District Attorney's office does not primarily enjoy local autonomy. Although such situations have seldom

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[26] There is no testimony stating that the Legislature has in any way restricted the District Attorney's Office from using such discretionary funds to pay a judgment.

arisen, Louisiana law provides several methods by which to circumscribe a district attorney's exercise of his authority. Such circumscription may only be effected by the State.

An analysis of the fourth *Clark* factor reveals that the Orleans Parish District Attorney's office is primarily concerned with State rather than local concerns inasmuch as the district attorney's job is to prosecute activities made actionable by the State. The district attorneys' offices were created to put control of criminal prosecutions of state laws in the hands of state officers.

With regard to the fifth *Clark* factor, it appears that a suit against the Orleans Parish District Attorney's Office necessarily raises claims against the District Attorney in his official capacity.

Finally, with regard to the final *Clark* factor, the answer remains unclear inasmuch as the Orleans Parish District Attorney's office holds and uses property titled both in the name of the City of New Orleans and in the name of the State of Louisiana.

Admittedly, there are aspects of the foregoing *Clark* analysis, particularly with respect to issues regarding funding and the right to hold and use property, which suggest that the Orleans Parish District Attorney's office may be considered a local entity. On the other hand, the remaining factors strongly indicate that it is an arm of the State. In *Clark v. Tarrant County*, 798 F.2d at 745, the Fifth Circuit stated that "if no single factor conclusively shows that the entity at issue is an arm of the State, then the court is to view all of the factors as a whole in making its determination." After viewing all of the *Clark* factors as a

whole, the Court finds that the Orleans Parish District Attorney's office is an arm of the State of Louisiana and entitled to Eleventh Amendment immunity.

RECOMMENDATION

For all of the foregoing reasons, it is **RECOMMENDED** that the Orleans Parish District Attorney's Office be dismissed because of its Eleventh Amendment immunity.[24]

A party's failure to file written objections to the proposed findings, conclusions, and recommendations in a magistrate judge's report and recommendation within ten (10) days after being served with a copy shall bar that party, except upon grounds of plain error, from attacking on appeal the unobjected to proposed factual findings and legal conclusions accepted by the district court, provided that the party has been served with notice that such consequences will result from a failure to object. *Douglass v. United Servs. Auto Ass'n*, 79 F.3d 1415, 1430 (5th Cir. 1996) (en banc).

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[24] The Court finds further that even in the event that the district attorney's office was not held to be an arm of the State and the district attorney's office was thus not immune pursuant to the Eleventh Amendment, Hudson's 42 U.S.C. § 1983 claims still *fail. See Heck v. Humphrey*, 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994). Further, to the extent that Hudson raises *habeas corpus* claims for relief, these claims must be dismissed without prejudice.

New Orleans, Louisiana, this 2 day of June, 1997.

/s/ Lance M. Africk
LANCE M. AFRICK
UNITED STATES
MAGISTRATE JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-30964

KEITH HUDSON;

Plaintiff-Appellant

UNIDENTIFIED PARTIES

Defendant-Appellee

v.

CITY OF NEW ORLEANS; DISTRICT ATTORNEY'S OFFICE; SUSAN RICHARDSON; MAURICE LANDRIEU

Defendants-Appellees

Appeals from the United States District Court for the Eastern District of Louisiana, New Orleans

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ON PETITION FOR REHEARING EN BANC

(Filed Jun. 17, 1999)

(Opinion 5/13/99, 5 Cir., ___, ___ F.3d ___)

Before REYNALDO G. GARZA, STEWART, and PARKER, Circuit Judges.

PER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R.

APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Carl E. Stewart
United States Circuit Judge

U.S. Constitution. Eleventh Amendment

Suits against states

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Louisiana Constitution, Article 4. Executive Branch § 8. Attorney General; Powers and Duties

Section 8. There shall be a Department of Justice, headed by the attorney general, who shall be the chief legal officer of the state. The attorney general shall be elected for a term of four years at the state general election. The assistant attorneys general shall be appointed by the attorney general to serve at his pleasure.

As necessary for the assertion or protection of any right or interest of the state, the attorney general shall have authority (1) to institute, prosecute, or intervene in any civil action or proceeding; (2) upon the written request of a district attorney, to advise and assist in the prosecution of any criminal case; and (3) for cause, when authorized by the court which would have original jurisdiction and subject to judicial review, (a) to institute, prosecute, or intervene in any criminal action or proceeding, or (b) to supersede any attorney representing the state in any civil or criminal action.

The attorney general shall exercise other powers and perform other duties authorized by this constitution or by law.

Louisiana Constitution, Article 5. Judicial Branch § 26. District Attorneys

Section 26. (A) Election; Qualifications; Assistants. In each judicial district a district attorney shall be elected for a term of six years. He shall have been admitted to the practice of law in the state for at least five years prior to his election and shall have resided in the district for the two years preceding election. A district attorney may select assistants as authorized by law, and other personnel.

(B) Powers. Except as otherwise provided by this constitution, a district attorney, or his designated assistant, shall have charge of every criminal prosecution by the state in his district, be the representative of the state before the grand jury in his district, and be the legal advisor to the grand jury He shall perform other duties provided by law.

Louisiana Constitution, Article 6. Local Government § 5. Home Rule Charter

(G) Parish Officials and School Boards Not Affected. No home rule charter or plan of government

shall contain any provision affecting a school board or the offices of district attorney, sheriff, assessor, clerk of a district court, or coroner, which is inconsistent with this constitution or law.

Louisiana Constitution, Art. 6 Local Government

§ 7. Powers of Other Local Governmental Subdivisions.

(B) Parish Officials and School Boards Not Affected. Nothing in this Section shall affect the powers and functions of a school board or the offices of district attorney, sheriff, assessor, clerk of a district court, or coroner.

Louisiana Revised Statutes, Title 16. District Attorneys.

Chapter 2. Judicial Districts, Part 1. Parish of Orleans

§ 71. Compensation; assistants and office help

A. There shall be a district attorney for the parish of Orleans.

B. He shall be elected by the voters of the parish at the time and for such term as are provided in R.S. 16.1. He shall receive an annual salary of fifty thousand dollars, payable monthly by the state treasurer upon the warrant of the district attorney, and such amount as the

city of New Orleans shall appropriate, to be paid in equal monthly installments.

C. He shall be a licensed attorney and shall perform all duties now prescribed by law or herafter prescribed by the legislature. He shall, appoint the necessary assistants to the district attorney of the parish of Orleans, in accordance with law, who shall be licensed attorneys and the necessary clerks, stenographers and special officers for the district attorney and fix salaries which shall be paid by the city of New Orleans with funds otherwise made available to the district attorney.

D. The city of New Orleans shall provide a sum of not less than one hundred and twenty-four thousand dollars per annum for the payment of the salaries of the assistant attorneys, clerks, stenographers, special officers, and the expenses of the district attorney's office.

E. The assistant district attorneys, clerks, stenographers and special officers may be removed at the discretion of the district attorney.

Louisiana Code of Criminal Procedure.

Art. 61. District attorney; powers and duties

Subject to the supervision of the attorney general, as provided in Article 62, the district attorney has entire charge and control of every criminal prosecution instituted or pending in his district, and determines whom, when, and how he shall prosecute.

Louisiana Code of Criminal Procedure.

Art. 62. Authority of attorney general; supervision of district attorney

The attorney general shall exercise supervision over all district attorneys in the state.

The attorney general has authority to institute and prosecute, or to intervene in any proceeding, as he may deem necessary for the assertion or protection of the rights and interests of the state.